



Southern Ozaukee Fire and
Emergency Medical Services Department
11300 N. Buntrock Avenue
Mequon, WI 53092
(262) 242-2530
(262) 242-5042 Fax

Southern Ozaukee Fire and Emergency Medical Services Department Commission
Wednesday January 11, 2023
6:00pm or Immediately Following SOFD Board Meeting
Thiensville Village Hall

Agenda

- 1) Call to order
- 2) Items Requiring Commission Action
 - a. Approve Hiring Process for Paid-on-Call Members
 - b. Review/Certify Eligibility List for Fire Department
 - c. Approve Hiring Process for Fulltime Firefighter/Paramedic
- 3) Potential Closed Session
 - a. Battalion Chief Vacancy: The SOFD Commission may convene into closed session pursuant to Wis. Stat. § 19.85(1)(c) for the purpose of considering the employment, promotion, compensation or performance evaluation data of any public employee over which the governmental body has jurisdiction or exercises responsibility, and then may reconvene into open session to take such action as deemed appropriate.
- 4) Adjournment

Attachments

Hiring process for Paid-on-Call
Hiring list for Paid-on-Call
Certification list of Paid-on-Call
Hiring process for fulltime firefighter/paramedic



Southern Ozaukee Fire and
Emergency Medical Services Department
11300 N. Buntrock Avenue
Mequon, WI 53092
(262) 242-2530
(262) 242-5042 Fax

Hiring Process for Paid on Call Members

Section 1- Open Continuous Applications

As a general policy the Fire Department will accept applications for fulltime and Paid-on-Call members at any time whether or not there is a current vacancy. Names of qualified applicants may be added to an eligibility list when such action is deemed necessary and in the best interest of the department. The department is an equal opportunity employer.

Section 2- Method of Applications

Unless otherwise specified, each applicant for a position within the Fire Department shall make application on a standard form and submit it to the Fire Chief. The submitted application and all related material shall be considered property of the Department.

Section 3- Authorized Number of Positions

The maximum number of Fulltime and Paid-on-Call positions and rank structure of the department shall be determined by the Fire Chief and fit the operational parameters of the Department. Full time positions shall be limited by the number of positions created by the SOFD Board.

Section 4- Requirements for Appointment

See job description for Paid-on-Call.

Section 5- Hiring Process

Submit application

Fire Chief reviews application

Applicant must pass a written test, physical agility test, and medical examination

Applicant is taken before the SOFD Commission for approval



Southern Ozaukee Fire and
Emergency Medical Services Department
11300 N. Buntrock Avenue
Mequon, WI 53092
(262) 242-2530
(262) 242-5042 Fax

TO: SOFD Commission
FROM: Fire Chief David L Bialk
DATE: January 5, 2023
SUBJECT: Hiring Process for Fulltime Firefighter/Paramedic

Background

During budget preparation process in September of 2022 the Southern Ozaukee Fire Board included the financial resources to hire 3.5 full time positions in 2023. The first two would be hired in the first quarter of 2023, one in the second quarter, the remaining one and half in the third quarter.

Analysis

The SOFD Commission has the authority to approve the recruitment process for the fire departments' vacant positions. Below listed is the proposed recruitment process for the fire departments full time firefighter paramedics. The process includes the following:

1. One month deadline for the current open positions while maintaining an open application process.
2. Classification of applications for adherence to minimum qualifications
3. Panel interviews
4. Written exercise
5. Command staff interviews
6. Commission certifies eligibility list
7. Chief extends offers of employment to approved candidate(s)
8. Pre-employment screening

It is the intent of the fire department to begin the recruitment process as soon as approval is given by the SOFD Commission.

Recommendation

Staff recommends the Commission review and approve the included recruitment process for the firefighter paramedic positions.



Southern Ozaukee Fire and
Emergency Medical Services Department
11300 N. Buntrock Avenue
Mequon, WI 53092
(262) 242-2530
(262) 242-5042 Fax

Hiring Process for Fulltime Firefighter/ Paramedic

1. Application

1. Every applicant shall complete the current SOFD employment application located on the fire department website. When completing the application, applicants must fill in all fields that apply. The work experience section must be completed. Applicants shall enter their entire work history. Applicants shall also forward a cover letter and resume along with the application via email to the Fire Chief at dbialk@ci.mequon.wi.us or mail to Southern Ozaukee Fire and EMS, 11300 N Buntrock Ave., Mequon, WI 53092.
2. The fire department reserves the right to invite only the most qualified applicants to participate in testing and interviews as defined in Section 2.
3. Any misrepresentation of a material fact contained in the application or omission of any material fact shall be sufficient cause for excluding the applicant from the examination, removing the applicant's name from the eligibility list or discharging the applicant from the Department.
4. Applicants for Firefighter/Paramedic must complete all steps of the Firefighter/Paramedic processes in order to be eligible for hire by the SOFD.

2. Minimum Qualifications at time of appointment

1. A valid driver's license. Class D or above
2. Firefighter Level 1 Certification (IFSAC/ProBoard)
3. Driver/Operator Pumper Certification (IFSAC/ProBoard)
4. Paramedic Certification - Wisconsin Credentialed at time of appointment.
5. Holds a valid CPAT Certificate at time of job offer or obtained within six months.

3. Recruitment Process

1. The Fire Chief or the Chief's designee will commence a recruitment process for Paramedic/Firefighter by posting a job ad and job description for a minimum of four weeks. Notice will be posted by the Fire Department on the department's website, the City of Mequon, Village of Thiensville website, and other communication resources.
2. Applicants who fulfill the minimum qualifications and initial screening by the Chief or the Chief's designee will be invited to an interview conducted at minimum by the Fire Chief, Deputy Chief, and/or Battalion Chief(s). Two members of the Commission may attend at a time to observe the panel interviews.
3. After the completion of the first panel interview, applicants selected to move forward will complete a written response exercise that will be submitted to the fire department by the time of the second interview, which will be conducted by the Fire Chief and command staff as the final step in the interview process.
4. Following the interview process, the Chief or the Chief's Designee will rank the applicants. Each applicant's final score will be an average of their respective results from all steps in the recruitment process. The following weight is given to each metric.
 - a. 10% - Application Materials
 - b. 30% - Internal Panel Interview
 - c. 10% - Written Response Exercise
 - d. 50% - Command Staff Panel Interview
5. The eligibility list must be reviewed and certified by the Fire Commission. The Chief may then select one or more of the candidates on the certified eligibility list to move forward in the recruitment process.
6. Upon selection by the Chief, a conditional offer of employment that includes the requirement of successfully passing a medical exam, background investigation, a psychological exam, and a drug screen will be presented to the candidate. The Fire Chief should be present when conditional offer letters are presented to Firefighter/Paramedic candidates to facilitate the next steps in the pre-employment onboarding process.



Southern Ozaukee Fire and
Emergency Medical Services Department
11300 N. Buntrock Avenue
Mequon, WI 53092
(262) 242-2530
(262) 242-5042 Fax

Job Description

Fulltime Firefighter/Paramedic

Date: January 11, 2023

Title: Fire Fighter/Paramedic

FLSA: Non-Exempt

Work Location: Fire Stations and in the field.

General Schedule: Rotating shift as assigned by the Fire Chief

Pay Grade: Paramedic/Firefighter

Position's Purpose: Under the direction of the Fire Department command staff, a Firefighter/Paramedic responds to fire related alarms and other calls for service, participates in proactive non-emergency community risk reduction activities, training, station work, and equipment maintenance activities. Furthermore, the position will respond to medical emergencies and provide pre-hospital care to victims of injury or illness. When not accompanied by a Chief, the Paramedic/Firefighter is ordinarily the highest medical authority at an emergency medical scene and as such, makes medical decisions based on standing orders, protocols, and orders from on-line and off-line medical direction.

Description of the Job

A: Essential Duties and Responsibilities:

- Performs complex diagnostic and medical procedures at the Paramedic scope of medical practice including, but not limited to intravenous cannulation, endotracheal intubation, recognition of cardiac arrhythmias and administration of various medications. Safely and efficiently transfers/extricates and moves patients from incident scenes to transporting ambulances. Accompanies, monitors, supports, and provides medical interventions as needed during patient transport.
- Drives, operates and or staffs an ambulance, rescue unit or other apparatus as assigned and/or operates as a member of paramedic level fire suppression company.
- Accurately completes detailed written and verbal reports on patient care activities to hospital emergency departments and for the purpose of documentation of organizational activities in a timely manner. Provides documentation and accounting for all activities and duties as assigned and required.
- Performs a thorough, daily inspection for readiness of the apparatus and equipment to which he/she is assigned or responsible for; notifies station officer of any condition requiring repair or maintenance; ensures that the inventory of supplies, medication, and equipment is complete; assures that apparatus, equipment, and related records are maintained and in good order in a timely manner.
- Respond in a timely manner to fire related alarms as directed with assigned company, effectively and efficiently per department procedures and guidelines lay, connect hose, operate pumping apparatus, operate, and direct water streams, raise, and climb ladders, ventilate burning structures; enter buildings to evacuate occupants. Respond to a variety of general emergency rescue calls including but not limited to auto accidents, gas system leaks and wildland and structural fires, search and rescue incidents.

- Participate in department and external training, community education and proactive community risk reduction activities as well as complete all other duties as assigned.
- Serve as an officer in charge when directed to or as needed.

B: Job Specifications:

Required Knowledge, Skills and Abilities: Effective and efficient execution of the following:

- Firefighting and rescue techniques, methods, and practices.
- Heavy lifting and physical maneuvering in challenging environments.
- Paramedic level medical procedures and patient assessment techniques.
- Job related arithmetic computations and formulas.
- Employ correct business English, including spelling, grammar, and punctuation in written forms.
- Communicating effectively in oral and written forms.
- Utilize electronic job-related electronic applications and programs or equipment.
- Employ socially acceptable techniques for dealing with a variety of individuals from various socioeconomic, ethnic, and cultural backgrounds, often in situations which may be stressful.
- Foster teamwork and provide a positive attitude and work environment with all co-workers.
- Demonstrating physical aptitude at a level required by general firefighting activities.
- Ability to act quickly, appropriately, and effectively in emergency and non-emergency settings.
- Operate and maintain composure while utilizing voice radio equipment.
- Understanding and following oral and written directions promptly and accurately.
- Understanding and acting in accordance with departmental policies, rules, and instructions.
- Present oneself in a manner that reflects positively on the organization and all co-workers.

C: Qualifications Required & Preferred:

The following certifications are required at time of hire/offer.

- A high school diploma or the equivalent (GED).
- A valid Class D or above driver's license - State of WI within 30 days of appointment.
- Is certified in WI as a Firefighter Level I
- Is certified in WI Driver/Operator Pumper
- Is licensed in WI as an EMT-Paramedic

The following credentials are preferred & required before completion of the probationary period.

- Is certified as a Fire Inspector. Licensed through the State of WI
- Is certified in WI Driver/Operator Aerial
- Valid CPAT Certificate
- BLS CPR Instructor

The following credentials are strongly encouraged during employment and at application.

- WI Critical Care Paramedic endorsement.
- Is certified in WI as a Fire Officer Level I & II
- NIMS 100/200/300/400/700/800
- ACLS & PALS Instructor

D: Title of Immediate Supervisor:

Under the general supervision of the assigned Battalion Chiefs, Deputy Chief, and Chief

E. Physical Requirements:

This work requires the regular physical exertion of up to 25 pounds of force, frequent exertion of up to 100 pounds of force and occasional exertion of over 200 pounds of force; work regularly requires standing, walking, using hands, reaching and repetitive motions, frequently requires speaking and hearing, kneeling, sitting, crouching or crawling, pushing or pulling and lifting and occasionally requires

climbing or balancing, tasting or smelling; work requires good vision aptitudes; vocal communication is required for expressing ideas and conveying detailed instructions to others accurately, loudly or quickly; hearing is required to perceive information at normal spoken word levels and to receive detailed information and/or to make fine distinctions in sound; work requires preparing and analyzing written or computer data, visual inspection of data and equipment, ability to follow lists and protocols, identify defects large and/or small, use of measuring devices, specialized medical devices, operating all sizes of motor vehicles and specialized firefighting equipment. Skilled in observing surroundings and activities in both emergent and non-emergent settings.

F: Environmental/Working Conditions:

Work regularly requires exposure to outdoor weather conditions, frequently requires working near moving mechanical parts, wearing an N95 face mask, a self-contained breathing apparatus and exposure to blood borne pathogens and may be required to wear specialized personal protective equipment and occasionally requires wet, humid conditions (non-weather), working in high, precarious places, exposure to fumes or airborne particles, exposure to toxic or caustic chemicals, exposure to extreme cold (non-weather), exposure to extreme heat (non-weather), exposure to the risk of electrical shock and exposure to vibration; work is generally in a loud noise location (e.g. grounds maintenance, heavy traffic). Majority of activities are performed in a team environment and the ability to effectively and appropriately communicate in both non-emergent and emergent situations is paramount.

G: Supplemental Information:

All successful candidates will be subject to in-depth background investigations, a psychological evaluation and pre-employment drug screening prior to installation in rank and will serve a two-year term of probation from start date. Term of probation may be extended based on job performance.

Disclaimer: The above information on this description has been designed to indicate the general nature and level of work performed by the employee(s) within this classification. It is not designed to contain or be interpreted as a comprehensive inventory of all duties, responsibilities and qualifications required of employees assigned to this job.

Approvals:

SOFD Board President

Department Head or Designated Representative

Incumbent



Southern Ozaukee Fire and
Emergency Medical Services Department
11300 N. Buntrock Avenue
Mequon, WI 53092
(262) 242-2530
(262) 242-5042 Fax

TO: SOFD Commission
FROM: Brian C. Sajdak
DATE: January 10, 2023
SUBJECT: Closed Session for Battalion Chief Vacancy

Background

The Commission may enter into closed session pursuant to Wis. Stat. § 19.85(1)(c) for the purpose of considering the employment, promotion, compensation or performance evaluation data of any public employee over which the governmental body has jurisdiction or exercises responsibility, and then may re-enter open session to take such action as deemed appropriate. The Fire Commission exercises responsibility for members of the fire departments in that they have sole authority over the hiring, promotion and discipline of such employees and can go into closed session to discuss the same.

Recommendation

Should the Commission decide that it wishes to enter closed session, a motion to enter closed session pursuant to Wis. Stat. §19.85(1)(c) for the purposes of considering the employment, promotion, compensation, or performance evaluation data of any public employee over which the governmental body has jurisdiction or exercises responsibility.

Handbook for Wisconsin Police and Fire Commissioners



Handbook for Wisconsin Police and Fire Commissioners

Attorneys Claire Silverman
and Maria Davis
League of Wisconsin Municipalities

Attorneys Steven Zach,
Catherine Wiese, and Julia Potter
Boardman & Clark LLP

Attorney Remzy Bitar
*Municipal Law &
Litigation Group, S.C.*

League of Wisconsin Municipalities
131 W. Wilson Street, Suite 505
Madison, Wisconsin 53703

Newly Revised December 2019

Preface

Wisconsin police and fire commissions have a long history in Wisconsin. Milwaukee's Board of Fire and Police Commissioners was created in 1885, and legislation establishing police and fire commissions in second- and third-class cities was adopted in 1897. Less than a year later, in December 1898, the League of Wisconsin Municipalities was created to help Wisconsin cities and villages share ideas and learn from each other, train and provide information to elected and appointed city and village officials, and advocate on behalf of municipalities with the Wisconsin Legislature, governor, and state agencies.

In keeping with our mission of providing information to help Wisconsin local government officials, the League has long provided a *Handbook for Wisconsin Police and Fire Commissioners*. The handbook you are holding is newly revised. We have packed it with helpful information and hope it will help guide Wisconsin's police and fire commissions in fulfilling their unique roles in Wisconsin municipal government and carrying out their responsibilities in a lawful manner.

This handbook was written by the League of Wisconsin Municipalities' attorneys, in conjunction with attorneys **Steven Zach**, **Catherine Wiese**, and **Julia Potter** of Boardman & Clark LLP, who wrote the chapters on hiring and discipline, and attorney **Remzy Bitar** of Municipal Law & Litigation Group, S.C., who wrote the chapter on municipal liability. We thank these attorneys for lending their significant expertise and talents to this effort.

This manual is current as of November 2019. Users should always check the statutes and cases cited to ensure they have not changed or been overruled or interpreted in a new manner.

This handbook is intended to provide general legal information and is not intended to provide legal advice. Municipal officials should consult the municipal attorney regarding local questions and problems. League members may direct questions of a general nature to the League legal staff by calling (800) 991-5502 or (608) 267-2380.

TABLE OF CONTENTS

Chapter I. Commissions	1	Chapter III. Discipline	31
1. About Commissions in General.....	2	1. Disciplinary Authority	32
A. Commissions in First Class Cities	2	A. Discipline Within the Scope of Commission Authority.....	32
B. When Commissions Must be Created	2	B. Discipline Not within the Scope of Commission Authority.....	33
C. Appointments and Terms	3	2. Initiation of Disciplinary Proceedings.....	34
D. Commission Composition.....	4	A. Who May File a Charge	34
E. Quorum.....	5	B. Against Whom May Charges Be Filed	34
F. Removal of Commissioners	5	C. What Must a Charge Contain	35
G. Commission Officers.....	5	D. Service.....	35
H. Compensation for Commissioners.....	5	E. Attorneys.....	35
I. Frequency of Commission Meetings	5	F. Pay Status	35
J. Commission Policies and Rules	6	3. Hearing Process.....	36
K. Commission Records	6	A. Initial Processing/Preliminary Meeting	36
2. Overview of a Commission's Duties	6	B. Scheduling Conference	37
A. Scope of a Commission's Authority.....	6	C. Hearing	37
B. Optional Powers for PFCs.....	7	D. Decision	38
3. How a Commission Fits into the Organizational		E. The Record	39
Structure of Municipalities.....	7	F. Review.....	39
A. Cities	7	Chapter IV. Open Meetings	
B. Villages and Towns.....	12	and Public Records	41
C. Joint Commissions	14	1. Key Provisions in Wisconsin's Open Meetings Law... 42	
Chapter II. The Hiring Process	17	A. What Is a Meeting and When Does One Occur?	42
1. The Statutory Authority	18	B. Reasonably Accessible, Public Notice and	
A. Chief.....	18	Open/Closed Session.....	43
B. "Subordinates"	18	C. Violations, Enforcement, and Penalties.....	46
C. Promotion	19	2. Key Provisions in Wisconsin's Public Records Law...47	
2. Qualifications.....	19	A. What Is an "Authority" and What Is a "Record"?	47
A. Who Establishes	19	B. Who Is the Legal Custodian of Records?	48
B. The Standards.....	20	C. Notice of Access to Records.....	48
3. The Hiring Process	22	D. Who Is a "Requester" and What Are Their Rights?	48
A. Authority to Hire	22	E. Form of the Request	49
B. Meetings.....	22	F. Reasonable Restrictions for Inspection.....	49
C. Job Description.....	23	G. Fees	49
D. Veterans' Preference	23	H. Custodian's Time for Response.....	50
E. Affirmative Action	24	I. Responding to Requests.....	50
F. Application	24	J. Requests for Employment-Related Records.....	51
G. Announcement	25	K. Requests for Information Pertaining to	
H. Tests/Examinations	25	Local Public Officials	53
I. Eligibility List.....	28	L. Requests Pertaining to Commission Proceedings	53
J. Background Check	29	M. Request Pertaining to Applicants for Employment	53
K. Conditional Offer of Employment	29	N. Separation of Information	54
L. Offer.....	30	O. Challenge to Accuracy of Records Containing Personally	
M. Probationary Period	30	Identifiable Information	54
		P. Enforcement and Penalties	54
		Q. Records Retention	54

TABLE OF CONTENTS

Chapter V. Municipal and Public Official Liability.....57

1. Municipal Liability Generally..... 58

- A. Municipal and Personal Liability under Wisconsin Law ... 58
- B. Indemnification..... 58
- C. Federal Law 58

2. Notice of Injury and Notice of Claim.....61

- A. Notice of Injury and Circumstances..... 61
- B. Written Claim..... 61

3. Liability Limits.....62

4. Immunities 63

5. Immunity Under Federal Law 65

Appendix 67

Forms in this Appendix are samples. They should be reviewed by legal counsel before use to make sure they are appropriate.

A. Hiring - Sample Documents

- 1. Job Description (Police Chief)..... 69
- 2. Application for Employment (Law Enforcement) 73
- 3. Authorization for Release of Information 77
- 4. Advertisement 79
- 5. Conditional Offer of Employment 81

B. Discipline - Sample Documents

- 1. Meeting Notice..... 83
- 2. Written Charges 85
- 3. Decisions..... 91, 97

C. Relevant Statutes

- § 60.55..... 105
- § 60.56..... 105
- § 60.57..... 106
- § 61.65..... 106
- § 61.66..... 108
- § 62.13..... 109

Chapter I

Commissions

1. About Commissions in General

More than a century ago, the Wisconsin legislature enacted the statute providing for the use of police and fire commissions (PFCs)¹ in Wisconsin. The legislature's primary purpose in creating PFCs was to "remove the administration of fire and police departments from city politics and to place it in the hands of impartial and nonpolitical citizen boards."² Before PFCs were created, appointments to the departments were often a form of political patronage. In requiring PFCs, the legislature intended to have the test of fitness for those serving in police and fire departments be the ability to serve the municipality rather than the ability to advance the political interests of the administration in power.³

As a body designed to professionalize police and fire departments and insulate them from politics, the PFC plays a unique role in municipalities. It is essentially a civil service body with exclusive jurisdiction over hiring, promotions, and discipline⁴ of police officers, firefighters, and department chiefs. Whether a municipality is required to have a PFC depends on a population threshold, as discussed below. Municipalities coming within the threshold cannot vary from the statutory provisions. This is because the statutes governing PFCs in cities and villages are to be construed as "an enactment of statewide concern for the purpose of providing a uniform regulation of police, fire, and combined protective services departments."⁵

Importantly, municipalities that are not statutorily required to have a PFC are prohibited from disciplining⁶ a police chief or law enforcement officer without first setting up an impartial committee or appointing an impartial person to act in place of a PFC.⁷ The person(s) so appointed cannot be elected or appointed municipal officials or municipal employees.⁸

A. Commissions in First Class Cities

Milwaukee is uniquely situated as Wisconsin's only first class city, and the only city with a special charter. PFCs in first class cities are governed by a different statute (§ 62.50) and the city charter. Milwaukee's Fire and Police Commission has dedicated professional staff and an executive director, and its commissioners are statutorily required to complete training conducted by the City. Because Milwaukee's Fire and Police Commission is governed by different rules than other Wisconsin PFCs and has its own training, this manual does not provide information on commissions in first class cities.

B. When Commissions Must be Created

Whether a municipality is required to have a PFC depends on the municipality's population. PFCs are mandatory in cities with a population equal to or greater than 4,000, and in villages with a population equal to or greater than 5,500.⁹ PFCs are also mandatory whenever municipalities form a joint fire, police, or combined protective services department.¹⁰ Wisconsin towns, regardless of population, are not required to create police and fire commissions, but may choose to do so; the decision to create a commission is made by the town board of supervisors.¹¹

A city that participates in a joint department or contracts for protective services and also creates one separate protective services department must create a commission to govern that separate department. A city that contracts for all its police protective services and fire protective services under § 62.13(8)(b) is not required to have a PFC.¹²

1. Although the relevant statutes contain references to police and fire commissions and often refer to the body as the "board of police and fire commissioners" or "board," this chapter of the handbook refers to the body as a PFC or commission to avoid possible confusion with village boards. The reference to PFC or commission, generally, is intended to include bodies that deal with only a single department (i.e., police commissions or fire commissions or combined protective services commissions). When a reference is meant to specifically apply to a particular type of commission (police or fire), the reference will be to a police commission or a fire commission.

2. *Conway v. Bd. of Police and Fire Comm'rs of City of Madison*, 262 Wis. 2d 1, 20, 662 N.W.2d 335 (2003), citing *State ex. rel. Pieritz v. Hartwig*, 201 Wis. 450, 230 N.W. 42 (1930).

3. *State ex. rel. Pieritz v. Hartwig*, 201 Wis. 450, 230 N.W. 42 (1930).

4. The term "discipline," as it is used under Wis. Stat. §§ 62.13(5)(em) and 61.65(3g)(d)2, refers to the suspension, reduction in rank, suspension *and* reduction in rank, or termination of a firefighter or police officer or the department chief.

5. Wis. Stat. §§ 62.13(12), 61.65(5).

6. See fn. 3.

7. See Wis. Stat. §§ 61.65(1)(am) and 62.13(6m). This prohibition does not apply if the officer's status is probationary or if the officer is covered by a valid and enforceable contract of employment or collective bargaining agreement providing for a fair review prior to discipline.

8. Wis. Stat. §§ 61.65(1)(am) and 62.13(6m).

9. See Wis. Stat. §§ 62.13(2) (cities) and 61.65(1)(b)2, 2(b)2 (villages).

10. Wis. Stat. §§ 61.65(1)(b)1.b., 61.65(3g)(b), 61.65(2)(b)2, 62.13(2)(b), and 62.13(2m)(b).

11. Wis. Stat. § 60.57(1).

12. Wis. Stat. § 62.13(2g) and (8)(b).

Villages with a population of 5,000 or more, but less than 5,500, must provide police protection by selecting from one of several options provided under state law.¹³ If such a village chooses to create its own police department or combined protective services department, it may either appoint a police commission or designate a committee of trustees to govern the department. However, once that same village reaches a population of 5,500, it must create a board of police commissioners.¹⁴

When a village reaches a population of 5,500 it must also provide fire protection services, again selecting from one of several options provided for under state law.¹⁵ If a village forms its own fire department, it must create a board of fire commissioners to govern the department.¹⁶ A village that has both a board of police commissioners and a board of fire commissioners may consolidate the two into a single board of police and fire commissioners.¹⁷

Cities and villages with populations below the thresholds requiring PFCs can still choose to establish a PFC by ordinance, as can towns. A municipality that establishes a permissive PFC can later choose to repeal the ordinance creating the PFC.¹⁸ As noted above, municipalities that are not required by population to have a PFC cannot discipline police officers or a police chief unless they appoint an impartial person or establish a committee of at least three persons, none of whom may be elected or appointed officials or employees of the municipality to perform the function of a PFC as set forth by statute.¹⁹

C. Appointments and Terms

With the exception of joint commissions, PFCs in cities, villages and towns are organized in the manner set forth in Wis. Stat. § 62.13(1), which provides for the appointment of five “citizens.”²⁰ Municipalities creating joint commissions (to govern joint departments) determine how many members the commission will have.²¹

PFC members are appointed by the mayor, village president, or town chairperson.²² In a city or village operating under the manager form of government, the manager appoints commission members. Mayoral appointments to a PFC are subject to common council confirmation;²³ appointments made by a village president or town chairman are not subject to confirmation unless required by local ordinance.²⁴ PFC appointments are announced between the last Monday in April and the first Monday in May.²⁵ State law does not specify the date on which a commissioner’s term of office begins.

A commissioner’s term of office is five years.²⁶ However, terms for members of joint commissions are set by the municipalities forming them and may be different. When the PFC is initially created, the terms of commissioners are typically staggered so that only one commissioner goes off the board in a single year. Persons appointed to fill a vacancy on a commission serve out the term of their predecessor. Persons serving in appointive offices in cities and villages serve until their successor is appointed and qualifies, unless otherwise provided by ordinance.²⁷ Copies of appointments to a police and fire commission must be filed with the commission secretary.²⁸ Each commissioner must take the official oath of office, prescribed in Wis. Stat. § 19.01, and file a copy with the municipal clerk. In cities, commissioners are required to take and file the official oath within 10 days after notice of appointment. In towns and villages, the oath must be filed within 5 days after notice of appointment.²⁹

13. Wis. Stat. § 61.65(l)(a).

14. Wis. Stat. § 61.65(l)(b)2.

15. Wis. Stat. § 61.65(2)(a).

16. Wis. Stat. § 61.65(2)(b).

17. Wis. Stat. § 61.65(3g)(a).

18. Wis. Stat. §§ 62.13(2) (cities), 61.65(1)(b) (villages) and 60.57(towns).

19. See footnote 5.

20. See Wis. Stat. §§ 61.65(3g)(d) 1 and 60.57(2).

21. Wis. Stat. §§ 62.13(2m)(b), 61.65(3g)(d).

22. Wis. Stat. §§ 62.13(1), 61.65(3g)(d)2.

23. Wis. Stat. § 62.09(3)(e); *State ex. rel. Pieritz v. Hartwig*, 201 Wis. 450, 230 N.W. 42 (1930).

24. Wis. Stat. §§ 61.65(3g)(d)3, 60.57(3).

25. Wis. Stat. § 62.13(l).

26. Wis. Stat. § 62.13(1).

27. Wis. Stat. §§ 62.09(5)(e), 61.23(1).

28. Wis. Stat. § 62.13(1).

29. Wis. Stat. §§ 60.31(1), 61.50, and 62.09(4)(a). In villages, it is not clear whether commissioners must take the oath. Wisconsin Stat. § 61.50 requires that officers for all offices named in § 61.19 take the oath. Since § 61.19 does not specifically refer to police and fire commissioners, it may be argued that commissioners need not take the oath. However, since the law clearly requires that commissioners in towns and cities take the oath, we suggest that commissioners in villages take and file the oath of office.

D. Commission Composition

Section 62.13(1) requires the appointment of citizens. The term “citizen” is not statutorily defined. Terms that are not statutorily defined are construed according to their common and approved usage.³⁰ Dictionaries are often consulted to determine common and approved usage.³¹ Although the *Merriam-Webster Dictionary* defines “citizen” as “an inhabitant of a city or town,” especially one possessing civic rights and privileges, it also defines “citizen” as “a civilian as distinguished from a specialized servant of the state.” Where words have multiple dictionary definitions, the applicable definition depends upon the context in which the word is used.³² The League has opined that this latter definition makes more sense with regard to the statute governing plan commissions, which requires that a plan commission “shall always have at least 3 citizen members who are not city officials.” This latter definition also seems more consistent with the legislative intent of insulating the police and fire departments from politics and the fact that the statutes prohibit municipalities without a PFC from disciplining a police chief or subordinate unless the municipality appoints a person or a committee, none of whom may be elected or appointed municipal officials or municipal employees, to act in place of a PFC. The League has long opined that the term “citizen” is not synonymous with resident and that residency for PFC commissioners is not required by statute but may be required by local ordinance.³³ Many statutes specifically require that appointees to boards or commissions, or a certain number of appointees, be “residents.” When that term is used, the appointee must reside within the city or village.

No appointment can be made which results in more than three members of the PFC “belonging to the same political party.”³⁴ This prohibition was included when the law providing for the establishment of PFCs was first created by ch. 247 of the 1897 Laws of Wisconsin. It remains today and is obviously intended to prevent the PFC from becoming political in nature, although some believe the provision seems archaic. No statutory definition is given for the phrase “belonging to the same political party.” The League has opined that unless an appointee to the PFC is an active, dues-paying member of a particular party, that person cannot really be considered as “belonging” to a political party within the meaning of § 62.13(1).³⁵ An unpublished court of appeals decision also concludes that “belonging to” a political party means being a member of the political party.³⁶

A frequent question is whether governing body members (members of the common council, village board, or town board) can serve on the PFC. The courts have not decided this question so there is no clear answer. As noted above, the League has suggested that the term “citizen” is used to distinguish between civilians and public officials and employees. Certainly, one can argue that the legislature, in using the term “citizen” meant to foreclose local officials or employees from serving on the PFC. However, it may also be argued that it is permissible for a governing body member to be appointed to the PFC by virtue of Wis. Stat. § 66.0501(2), which provides in pertinent part as follows:

The governing body may be represented on city, village or town boards and commissions where no additional compensation, except a per diem, is paid to the representatives of the governing body and may fix the tenure of these representatives notwithstanding any other statutory provision.

An informal (unpublished) attorney general opinion dated June 28, 2004 concludes that governing body members may not serve on PFCs since the legislature’s clear intent in providing for PFCs was to insulate the police and fire departments from politics. However, the short, informal opinion fails to acknowledge or consider legislative history where a statute similar to § 66.0501(2) but specific to cities³⁷ was briefly amended to specify that the council could be represented on other boards and commissions, except the board of police and fire commissioners, but then was quickly repealed.

30. Wis. Stat. § 990.01(1); *State ex rel. Kalal v. Circuit Court for Dane Cty.*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110.

31. *State v. Curiel*, 227 Wis. 2d 389, 597 N.W.2d 697 (1999).

32. *Ho-Chunk Nation v. Wisconsin Dep’t of Revenue*, 2009 WI 48, ¶ 23, 317 Wis. 2d 553, 766 N.W.2d 738 citing *State ex rel. Kalal v. Circuit Court for Dane Cty.*, 2004 WI 58, ¶ 49.

33. League of Wisconsin Municipalities opinions Commissions 84, Commissions 90, Commissions 153X.

34. Wis. Stat. § 62.13(1).

35. Police and Fire Commissions 133.

36. See *Milwaukee Police Ass’n and Vidmar v. City of Milwaukee*, 2016 AP 1573 (Wis. Ct. App., Sept 12, 2017) unpublished.

37. The statute was § 62.09(2)(b), amended by 1959 Wis. Act 432 (also referred to as Chapter 432), and repealed 2 weeks later by 1959 Wis. Act 499.

Although the law does not definitively answer whether a governing body member may serve on the PFC, having a governing body member on the board may not be the best policy given that the PFC's primary purpose is to insulate the police and fire departments from politics. Moreover, governing body members who serve on a PFC may find this service creates significant tension with the procedural due process rights of police and fire department personnel.

E. Quorum

On five-member commissions, three members constitute a quorum. On joint commissions with more members, a majority of the commissioners constitutes a quorum.³⁸ A quorum is that number which enables the body to exercise its power and duties. Without a quorum, the body lacks authority to meet or transact business.

F. Removal of Commissioners

While a PFC is an independent body, its members are not immune from removal. Removal of appointed officials in towns and villages is governed by Wis. Stat. § 17.13, which allows the officer or body that appointed the member to remove the officer at pleasure. Removal of an appointive officer by a body requires a majority vote of all the members thereof. A PFC member may also be removed by a circuit court judge for cause, which is defined as “inefficiency, neglect of duty, official misconduct or malfeasance in office.”³⁹

Removal of officers in cities is governed by Wis. Stat. § 17.12. Under § 17.12(1)(cm), a mayor or the common council can remove a PFC member for cause, which is defined as “inefficiency, neglect of duty, official misconduct or malfeasance in office.”⁴⁰ Removals for cause must follow the procedures set forth in Wis. Stat. § 17.16, which requires verified charges brought by a resident taxpayer and a speedy public hearing. Removal requires an affirmative vote of three-fourths of all the members of the common council.

G. Commission Officers

PFCs commonly elect a president, a vice president, and a secretary. The election of officers may be an annual event and is the only time that the body can use secret ballots.⁴¹ The statutes do not provide much detail about each officer's duties. Thus, officer duties and responsibilities should be detailed in rules adopted by the commission. Adopting such rules helps eliminate uncertainty about who has authority to call a meeting, who is responsible for giving notice of commission meetings, who sets the agenda for meetings, and who presides when the president is absent.

H. Compensation for Commissioners

Although not required by state law, a municipality's governing body may compensate commission members; this may take the form of a fixed annual salary, per diem payments for each day or part of a day the commission meets, or a combination of the two. The governing body also may provide for the reimbursement of expenses incurred by commission members in the performance of official duties.

I. Frequency of Commission Meetings

State law does not specify how often a commission must meet; the frequency of meetings is usually determined by a commission's need to discharge its duties. A commission might adopt rules calling for monthly meetings, plus additional meetings at the call of the president. An organizational meeting, at which officers are elected, is usually held after the appointment of new commissioners each year. Commission meetings are subject to the Wisconsin Open Meetings Law (see Chapter IV for more information on that law).

38. Wis. Stat. §§ 62.13(1), 61.65(3g)(d)1.b.

39. Wis. Stat. §§ 17.13(3), 17.001.

40. Wis. Stat. § 17.001.

41. Wis. Stat. § 19.88(1).

J. Commission Policies and Rules

A commission should consider two key areas of concern in establishing policies and rules. One is adopting rules related to the commission's statutory duties and responsibilities in appointing personnel to a police or fire department; these should include rules governing the:

- Examination of the physical and educational qualifications of individuals seeking appointment.
- Use of competitive examinations for appointment to the police or fire department.
- Approval by the commission, of personnel appointed to the police or fire department.

A second area of concern involves adopting rules governing how the commission conducts its business, including:

- Basic organizational rules. These may be thought of as bylaws governing a commission's organization and how it conducts its business. Rules adopted by a commission must not conflict with state law.
- Rules governing disciplinary actions that may be initiated or reviewed by a commission. Care must be taken that rules and procedures adopted conform with accepted practices in treating disciplinary matters and will withstand scrutiny if a court is asked to review a commission's actions.

A police and fire commission might adopt rules and procedures for special situations. For example, commissions exercising optional powers may adopt rules and procedures governing how a police or fire department will be organized and managed.

K. Commission Records

A PFC must keep a record of its proceedings.⁴² Other records also may be created or come into the commission's possession; for example, applications for appointment to the police and fire departments. Commission records are subject to the Wisconsin Public Records Law. The commission president is the legal custodian of these records unless another individual, such as the commission's secretary or a municipal employee, is designated to serve as custodian. For more information on Wisconsin's Public Records law, see Chapter IV.

2. Overview of a Commission's Duties

A. Scope of a Commission's Authority

The statutory powers, duties, and responsibilities of a PFC are significant. A commission has authority to:

- Appoint, suspend, or remove the chief of the police, fire, or combined protective services department.⁴³
- Approve all appointments made by the chief(s), including the promotion of subordinates.⁴⁴
- Approve and control competitive examinations used to judge suitability for appointment of subordinates.⁴⁵
- Approve each list of individuals determined to be eligible for appointment.⁴⁶
- Suspend the chief of a department or subordinates pending the filing and hearing of charges against them.⁴⁷
- Initiate charges against the chief of a department or any subordinate.⁴⁸ Since the PFC hears and decides any charges, this should be avoided if possible. If it is necessary, the PFC should seek legal advice to ensure proper mechanisms are put in place to ensure the person charged receives due process.

42. Wis. Stat. § 62.13(l).

43. Wis. Stat. § 62.13(3).

44. Wis. Stat. § 62.13(4)(a).

45. Wis. Stat. § 62.13(4)(d).

46. Wis. Stat. § 62.13(4)(a).

47. Wis. Stat. § 62.13(3), (5)(a).

48. Wis. Stat. § 62.13(5)(b).

- Hear charges filed against the chief of a department or a subordinate, make findings and determinations, and impose penalties.⁴⁹
- Hear appeals of disciplinary actions initiated by the chief of a department against any subordinate.⁵⁰

B. Optional Powers for PFCs

Under Wis. Stat. § 62.13(6), PFCs in cities and villages⁵¹ can be granted additional authority, usually referred to as “optional powers.” Optional powers include authority to:

- Organize and supervise the department(s).
- Adopt rules governing the control and management of the department(s).
- Contract for and purchase all necessary apparatus and supplies for the use of the departments under their control, excluding erection and control of the departments’ station buildings.
- Audit bills, claims, and department expenses before paid by the municipal treasurer.

An “optional powers” PFC assumes the responsibilities normally exercised by a mayor, city/village manager, or a village board of trustees in supervising the day-to-day management of a police, fire, or combined protective services department. The chiefs report directly to the commission on all matters related to the management of their departments.

Authority to exercise optional powers can only be granted following a referendum and approval by a majority of electors voting at the election. In order for the question to be placed on a ballot, a petition proposing to grant the PFC optional powers must be filed with the clerk, signed by electors equal in number to not less than 20 percent of the total votes cast in the municipality for governor at the last general election. The petition needs to be filed at least 70 days prior to a regular city election in order to be on the ballot for an election.

The League has opined that a grant of optional powers may only be revoked by following the same petition and referendum procedures used to grant the authority.⁵² However, the League has also opined that in a municipality not statutorily required to have a PFC, a municipality can abolish an optional powers PFC by adopting a repealing ordinance as authorized under Wis. Stat. § 62.13(2).⁵³

3. How a Commission Fits into the Organizational Structure of Municipalities

A. Cities

State law designates the mayor as a city’s chief executive officer and head of the police and fire departments.⁵⁴ In cities operating under the council-manager form of government, the city manager is the chief executive officer and head of the police and fire departments. (Some cities create the position of city administrator. The position of city administrator should not be confused with the position of chief executive officer.)

A city’s chief executive officer sets policies, makes executive decisions, appoints, removes and directs the work of agency heads. State law specifically provides that the “chief of police shall have command of the police force of the city under the direction of the mayor” and that “the chief shall obey all lawful written orders of the mayor or common council.”⁵⁵

49. Wis. Stat. § 62.13(5)(d), (5)(e). Options available to the PFC include suspension, reduction in rank, suspension and reduction in rank, or removal.

50. Wis. Stat. § 62.13(5)(d).

51. Wis. Stat. § 60.57(3) does not include § 62.13(6) as an option for town PFCs but the League has opined that a joint fire department created by a town and a village pursuant to Wis. Stat. § 61.65(2)(b)2 can be granted optional powers if the electors in both the town and the village authorize optional powers by referendum. See Police and Fire Commissions 183.

52. Police and Fire Commission 138. This conclusion is based on the notion that amendment, repeal or suspension of legislation requires an act of equal dignity and formality as the initial act. See e.g., *Cross v. Soderbeck*, 94 Wis. 2d 331, 288 N.W.2d 779 (1980); McQuillin, Law of Municipal Corporations § 21.11.

53. Police and Fire Commissions 123.

54. Wis. Stat. § 62.09(8)(a), (8)(d).

55. Wis. Stat. § 62.09(13)(a).

A mayor's authority does not extend into areas of responsibility assigned by law to a PFC. For example, while a mayor appoints the head of most city agencies and may control appointments and promotions within these agencies, approval of appointments and promotions in the police and fire departments are the exclusive domain of the PFC.

A commission's autonomy in adopting policies, rules, and procedures extends into other areas as well. For example, if a city has adopted rules and procedures governing the recruitment, testing, and selection of city employees and a commission believes the interests of the police and fire departments would be better served by adopting different rules and procedures for the recruitment, testing, and selection of police and fire subordinates, it may adopt those rules and procedures.⁵⁶

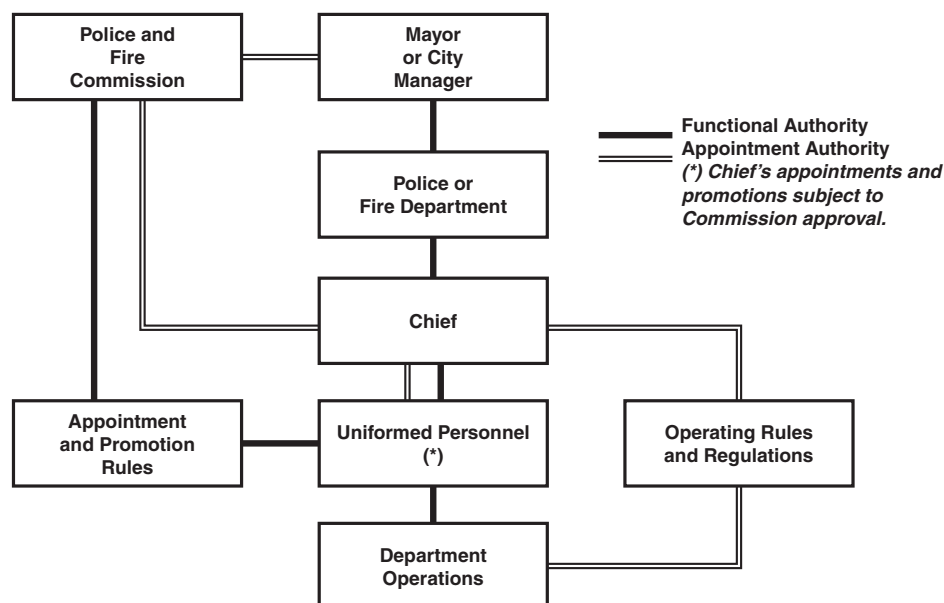
Mayors can, however, influence matters related to appointing and promoting police and fire personnel in other ways. As chief executive officer, a mayor is in charge of executing the common council's legislative policies regarding city's finances (i.e., the budget); if a mayor, adhering to the city budget directs the chief of a police or fire department not to fill a vacant position, the police and fire commission may be powerless to act in the matter.

Because a mayor serves as chief executive officer and statutory head of the police and fire departments, police and fire chiefs occasionally find themselves in a difficult position.

Subordinate to the mayor in most matters related to the management of their departments, chiefs are also subject to direction from a commission on many important personnel matters.

Figure 1 (below) does not show the important role played by a city's common council but its influence in matters related to the management of both the police and fire departments can be significant. Through its control of a city's fiscal purse strings and involvement in policy making, a common council can affect the structure, management and operations of city agencies. While a common council may not interfere with a PFC in the exercise of the commission's statutory powers, decisions made by a common council sometimes can effectively limit the options open to a commission in meeting its responsibilities.

Figure 1. Lines of Authority in Wisconsin Cities
(Police and Fire Commission does not exercise optional powers.)



56. Wis. Stat. § 62.13(4)(c).

Cities Served By A Firefighters' Association

Some cities are served by private firefighters' associations, often called volunteer fire departments, and a number of these cities have a PFC. A firefighters' association is organized under the provisions of Chapter 213, Wisconsin Statutes, and also may operate as a non-stock corporation under Chapter 181, Wisconsin Statutes. While the commission's authority over a police department is quite clear, it is not always clear what authority a commission has over association members engaged in fire fighting activities. To complicate matters further, some private associations may provide services to both a city and one or more neighboring municipality.

It should be noted that nonprofit corporations providing public health or safety services to a municipality and receiving more than half their funds from the municipality are an "authority" under the Wisconsin Public Records law and the body's records are subject to public inspection to the extent allowed by law.⁵⁷ Such corporations may also be "quasi-governmental corporations" subject to Wisconsin's Open Meetings law.⁵⁸

Members of a firefighters' association elect officers and trustees annually; members also elect a fire chief to oversee the association's firefighting activities.⁵⁹ The election of a chief usually is not subject to municipal approval. Nor is there any requirement that an elected chief have training or other qualifications for the position.

Usually a city served by a firefighters' association owns the apparatus, such as engines, tankers, aerial or ladder trucks used in firefighting operations, and also may own and maintain the physical facility in which firefighting equipment is stored. The city depends on members of the private association to operate publicly-owned firefighting equipment, eliminating the need to hire and train city employees for firefighting duties. This arrangement should be formalized by a written agreement between the city and the association.

Depending on a private association to provide a force of firefighters does not prevent a city from hiring a fire chief or other employees for duties related to firefighting, fire prevention, inspection and code enforcement, hazardous materials control or emergency services fire departments normally provide. If a chief and other employees are hired, the commission appoints the chief and approves the chief's appointment or promotion of subordinates.

As Figure 2 (on page 10) suggests, a city's decision to hire employees to staff its fire department, while contracting with a firefighters' association to provide the bulk of manpower needed for firefighting operations, may raise questions concerning the control and authority exercised by the city. These points are worth noting:

- The relationship between a city, as a corporate entity, and a firefighters' association is usually contractual and can be modified or ended.
- Even if a firefighters' association is organized as a non-stock corporation under Chapter 181, a common council may, for misconduct or when they consider it proper, adopt a resolution disbanding the association.⁶⁰
- In any city served by a firefighters' association, the appointment of a municipal fire chief, the approval of appointments made by the chief, and adoption of rules governing appointments, including promotions, remain the commission's responsibility.

A city's need to maintain control over vital municipal services, while relying on private organizations to provide some of these services, has resulted in innovative approaches to minimizing potential problems. One involves establishing, by ordinance, a municipal fire department and hiring one or more employees to carry out key tasks related to department administration, planning, inspections and code enforcement, equipment maintenance, and coordination of services. The city then contracts with a firefighters' association to recruit, train, and provide sufficient numbers of personnel to staff and operate city-owned firefighting apparatus.

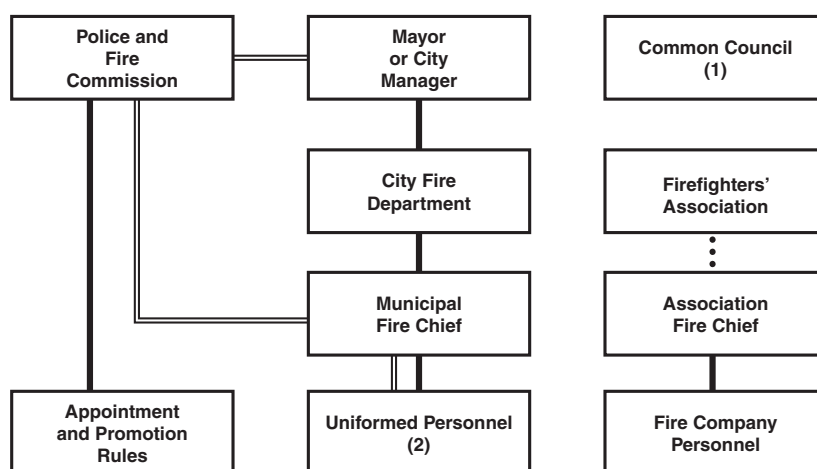
57. Wis. Stat. § 19.32(l).

58. See Wisconsin Department of Justice *Wisconsin Open Meeting Compliance Guide* (2019) at pp. 5-6, available at <https://www.doj.state.wi.us/sites/default/files/office-open-government/Resources/OML-GUIDE.pdf>.

59. Wis. Stat. §§ 213.02, 213.08.

60. Wis. Stat. § 213.04.

Figure 2. Lines of Authority in Cities by a Volunteer Firefighters' Association
(Association formed under Chapter 213, *Wisconsin Statutes*.)



— Functional Authority
 == Appointment Authority
 Elective Process

1. Common council approves contract for purchase of services from firefighters' association.

2. City fire chief's appointments and promotions subject to commission approval.

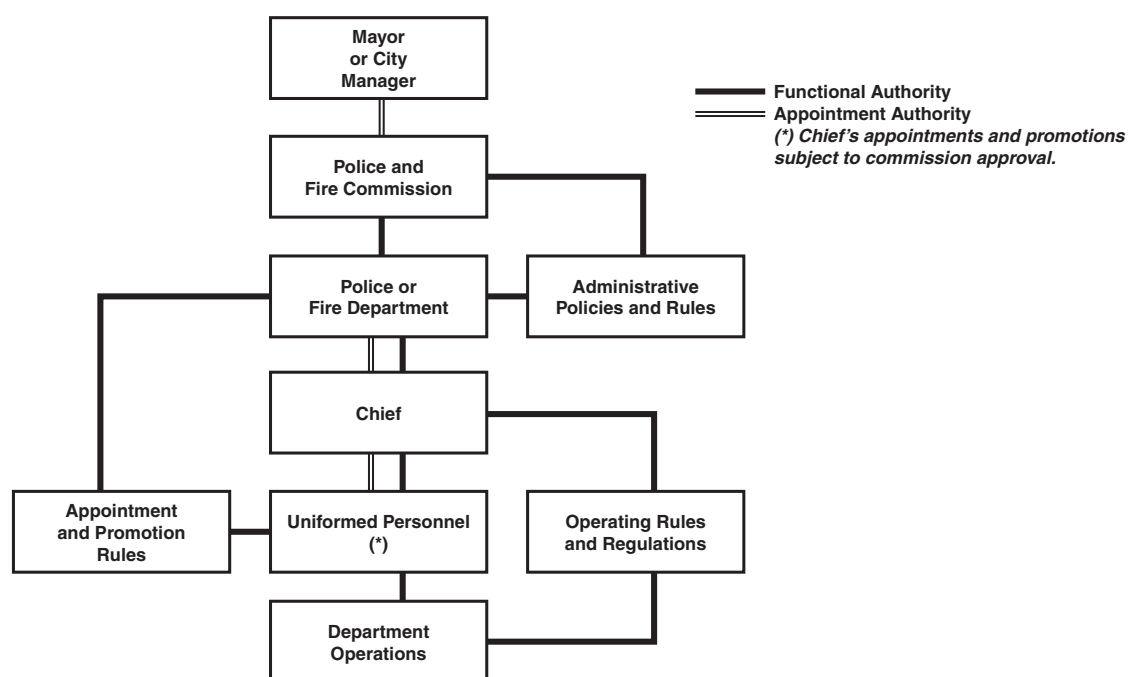
The Optional Powers Commission in a Wisconsin City

Granting optional powers to a PFC changes the customary flow of authority and exercise of responsibilities in managing police and fire departments. An optional powers commission takes on the executive responsibilities normally exercised by a mayor as chief executive officer and statutory head of the police and fire departments. The mayor no longer plays a direct role in managing either agency; both chiefs report to the commission on matters related to their departments.

Under the provisions of Wis. Stat. § 62.13(6), an optional powers commission has authority to do the following for police, fire, or combined protective services under their supervision:

- Organize and supervise the department(s).
- Exercise supervision over the chiefs and officers.
- Adopt policies, rules, and regulations governing the management of the department(s).
- Contract for and purchase necessary apparatus and supplies for the department(s), excluding erection and control of the department buildings.
- Audit and approve payments of bills, claims, and expenses before paid by municipal treasurer.

Figure 3. Lines of Authority in Wisconsin Cities
(Police and Fire Commission exercise optional powers)



An optional powers commission's authority to manage a police, fire, or combined protective services department is broad and includes adopting administrative policies, rules, and regulations governing personnel, financial, and general management matters. The chief of each department retains responsibility for establishing rules regulating how personnel in their department perform the technical aspects of their work. A police chief, for example, would be expected to establish operational policies, rules and regulations governing the investigation of crimes, the use of deadly force, and high-speed pursuits by police officers. A fire chief would establish operational policies, rules and regulations related to fire suppression activities, inspections, and fire code enforcement.

The added tasks taken on by an optional powers commission include directing the preparation of each department's annual budget request. After its approval by the commission, the proposed budget is submitted to the mayor for review and inclusion in the executive budget submitted to the common council. Following the council's adoption of a budget for each city agency, the commission closely monitors administration of the police and fire department budgets.

Development of a long-range capital improvements plan also calls for commission participation in the planning and approval process, including its review and adoption by the mayor and common council.

The relationship between a common council and the city's police and fire departments does not change when a commission is authorized to exercise optional powers; the council continues to control the fiscal purse strings, establish public policy, and monitor agency operations through the exercise of legislative oversight. What does change is the increasing frequency with which the commission is likely to come into contact with the common council and its committees on matters related to the management and operations of the department(s) it has jurisdiction over.

The Optional Powers Commission in a Wisconsin Village

An optional powers commission exercises most of the executive powers and responsibilities usually discharged by a village board of trustees in the management of police and fire protection services. The police and fire (or combined protective services) chiefs report to the commission on nearly all matters related to the management of their respective departments. (See Figure 3 (above) for commissions exercising optional powers in a city. The position of village president can be substituted for the post of mayor in showing lines of authority and responsibility for rulemaking when a village PFC exercises optional powers.)

Some important features of the traditional relationship between a village board of trustees and the police and fire departments do not change when a commission is authorized to exercise optional powers. The board continues to control the fiscal purse strings, establish public policy, and monitor agency operations through the exercise of legislative oversight. These traditional legislative powers are exercised by the governing body of every village; they are not affected by granting a commission the authority to exercise optional powers.

B. Villages and Towns

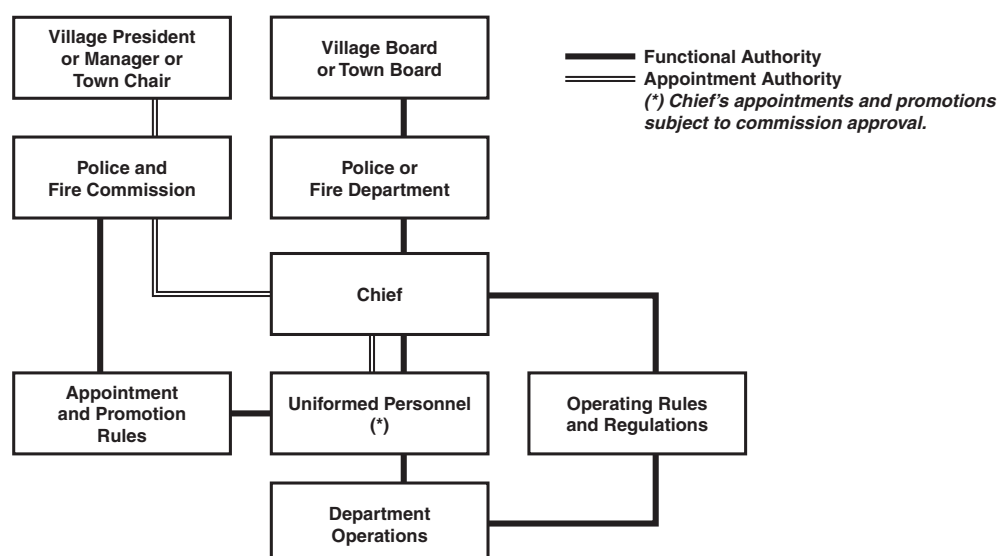
In describing how PFCs fit into the organizational structure of municipal government, villages and towns will be treated together. Unlike cities, Wisconsin villages and towns do not have chief executive officers; exceptions to this rule are the fewer than 10 Wisconsin villages, out of 412 in the state, that operate under the manager form of government. (Some villages appoint a person to the post of village administrator. The position of administrator should not be confused with the position of chief executive officer.)

Unlike mayors, village presidents and town chairpersons are voting members of their respective governing bodies (village board of trustees or town board of supervisors) rather than chief executive officers. And unlike a common council, village and town boards exercise both legislative and executive powers. Serving in this unique dual role, a village or town board is in charge of all municipal affairs; this includes overseeing the management of municipal agencies. This means that except in matters which by state law fall within the jurisdiction of a police and fire commission, police and fire chiefs in villages and towns normally report to and take direction from the governing body.

State law requires villages with a population of 5,000 or more to provide police protection. Villages with a population of 5,500 or more also must provide fire protection.⁶¹ Towns, on the other hand, need not provide police protection, but every town is required to provide fire protection.⁶² This does not mean each village or town must create its own police or fire department. Creating a municipal police or fire department is one of several options available under state law.

If a village or a town creates its own police or fire department, and also is required or opts to have a police or fire commission, the department is subject to the commission's jurisdiction in all matters assigned to commissions under Wis. Stat. § 62.13. When two municipalities create a joint police or fire department, the department is under the joint commission's jurisdiction.⁶³

Figure 4. Lines of Authority in Wisconsin Villages and Towns
(Police and Fire Commission *does not* exercise optional powers.)



61. Wis. Stat. § 61.65(2)(a).

62. Wis. Stat. § 60.55(1)(a).

63. Wis. Stat. § 61.65(1)(b), (2)(b).

Villages and Towns Served by a Firefighters' Association

Many Wisconsin villages and towns are served by private firefighters' associations, often called volunteer fire departments, and some of these municipalities have a police and fire commission. While the commission's authority over a police department is clear, it is not always clear what authority a commission has over association members engaged in firefighting activities. To complicate matters, a firefighters' association might provide services to one or more neighboring municipalities.

A firefighters' association is organized and conducts its affairs under the provisions of Chapter 213, Wisconsin Statutes. It may choose to form a non-stock corporation under Chapter 181, Wisconsin Statutes. Nonprofit corporations providing public health or safety services to a municipality and receiving more than half their funds from the municipality, are an "authority" subject to the Wisconsin Public Records Law; this means that the organization's records are open to public inspection to the extent allowed by law.⁶⁴ Such corporations may also be "quasi-governmental corporations" subject to Wisconsin's Open Meetings law.⁶⁵

Members of a firefighters' association elect officers and trustees annually; members also elect a fire chief to be in charge of the association's firefighting activities.⁶⁶ The election of a chief usually is not subject to municipal approval, nor is there any requirement that an elected chief have training or other qualifications for the position.

Usually a municipality served by a firefighters' association owns the apparatus, such as engines, tankers, aerial or ladder trucks used in firefighting operations, and may also own and maintain the physical facility in which firefighting equipment is stored. The village or town depends on association members to operate publicly owned firefighting equipment, eliminating the need to hire and train municipal employees for fire fighting duties. This arrangement should be formalized by a written agreement between the municipality and the association.

Contracting with a private firefighters' association does not prevent a village or town from hiring a fire chief or other employees for duties related to firefighting, fire prevention, inspection and code enforcement, hazardous materials control or emergency services that fire departments normally provide. If a chief and other employees are hired, the commission appoints the chief and approves the chief's appointment or promotion of subordinates.

A village or town's decision to hire employees to staff its fire department, while contracting with a firefighters' association to provide the bulk of manpower needed for firefighting operations may raise questions concerning the control and authority exercised by the village or town. These points are worth noting:

- The relationship between a village or town and a firefighters' association is usually contractual and can be modified or ended.
- Even if a firefighters' association is organized as a non-stock corporation under Chapter 181, a village board may, at any time and for misconduct or if it considers it proper, adopt a resolution disbanding the association.⁶⁷

In any village or town served by a PFC, the appointment of a municipal fire chief, the approval of appointments made by the chief, and adoption of rules governing appointments, including promotions, remain the commission's responsibility.

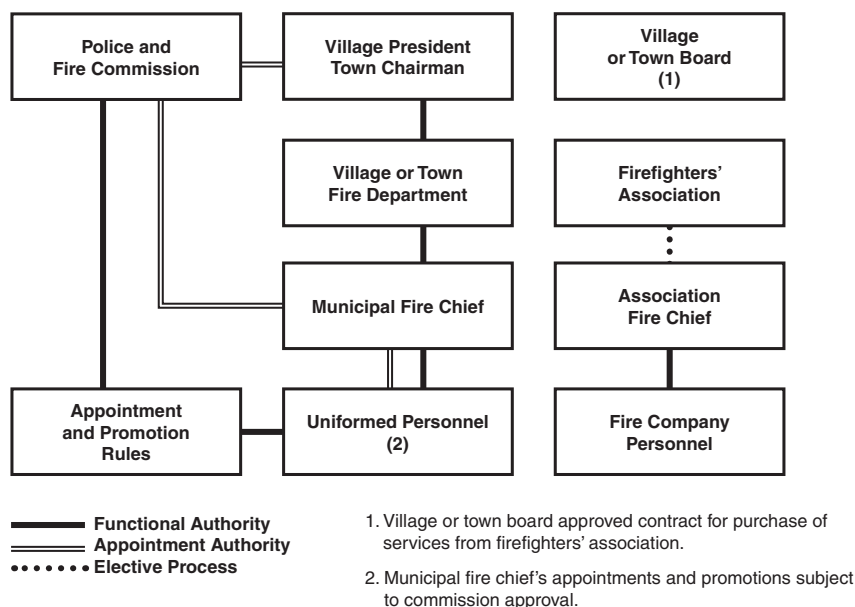
64. Wis. Stat. § 19.32(l).

65. See Wisconsin Department of Justice *Open Meeting Compliance Guide* (2019) at pp. 5-6, available at <https://www.doj.state.wi.us/sites/default/files/office-open-government/Resources/OML-GUIDE.pdf>.

66. Wis. Stat. §§ 213.02, 213.08.

67. Wis. Stat. § 213.04.

**Figure 5. Lines of Authority in Villages and Towns Served
By a Volunteer Firefighters' Association**
(Association formed under Chapter 213, *Wisconsin Statutes*.)



A village or town's need to maintain control over vital municipal services, while relying on private associations to provide some of these services, has resulted in innovative approaches to minimizing potential problems. One involves establishing, by ordinance, a municipal fire department and hiring one or more employees to carry out key tasks related to department administration, planning, inspections and code enforcement, equipment maintenance, and coordination of services. The village or town then contracts with a firefighters' association to recruit, train, and provide sufficient numbers of personnel to staff and operate municipally owned firefighting apparatus.

C. Joint Commissions

When two or more municipalities form a joint police or a joint fire or a joint combined protective services department, state law requires that a joint commission be appointed to govern the joint department. The participating municipalities decide how many members will be appointed to serve on the commission, the length of each member's term, and the apportionment of members between or among the municipalities.⁶⁸ Although a joint commission normally is responsible only for the department under the commission's jurisdiction, a joint commission may be given jurisdiction over a separate police or fire department that serves one of the municipalities represented by the joint commission. For example, if two municipalities decide to form a joint fire department, a joint fire commission must be created. If either municipality has a police department and its own police commission, the municipality may request that the joint fire commission assume responsibility for its police department; if the joint commission accedes to the request, the municipality will not have to maintain a separate police commission.⁶⁹

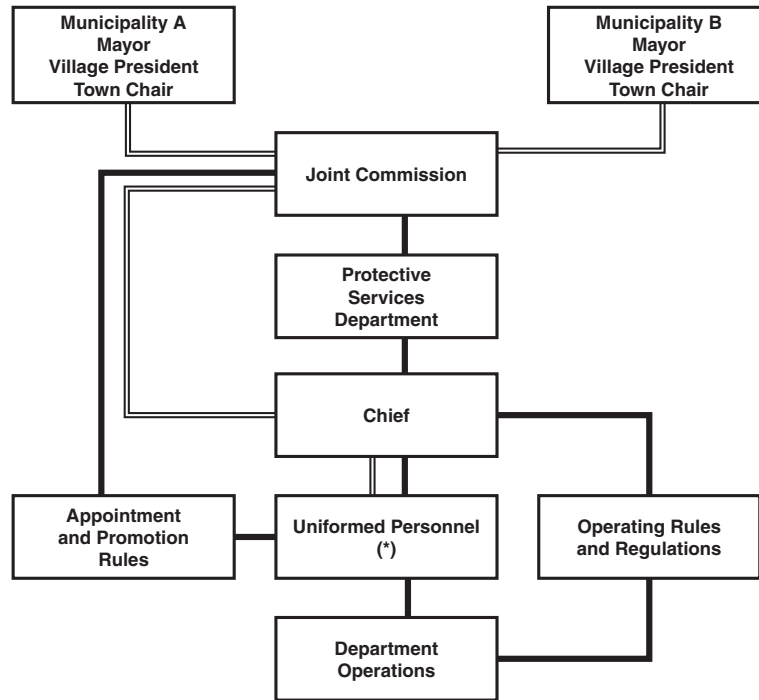
The authority to exercise optional powers can be granted to a joint police or fire or combined protective services commission, but only as the result of a referendum approved by the voters in each municipality served by the joint commission.⁷⁰ The proposition to grant optional powers appears on a ballot as the result of circulating a petition and obtaining the number of signatures called for in state law. Wisconsin Stat. § 62.13 (6) governs the procedures that need to be followed in granting optional powers. In all other respects, the powers, duties, and responsibilities of joint commissions do not differ from those of other police and fire commissions.

68. Wis. Stat. §§ 62.13(2m)(b), 61.65(3g)(d).

69. Wis. Stat. § 61.65(3g)(c).

70. Wis. Stat. § 61.65(3g)(d)2.

Figure 6. Lines of Authority in Municipalities Creating a Joint Commission
(Commission *does not* exercise optional powers.)



— Functional Authority
= Appointment Authority

(*) Chief's appointments and promotions subject to commission approval.

This page intentionally left blank.

Chapter II

The Hiring Process¹

1. This chapter was written by attorneys Steven Zach, Catherine Wiese, and Julia Potter of Boardman & Clark LLP.

1. The Statutory Authority

In cities and villages that have a police and/or fire commission(s),² the authority to hire police chiefs, fire chiefs,³ combined protective services chiefs, and subordinates and to promote within the departments is vested exclusively with either the commission or the chiefs. Commissions have the exclusive authority to appoint a chief and the chief has the authority to appoint subordinates subject to the commission's approval.⁴

While commissions have the statutory authority to hire a chief and approve the hiring and promotion of subordinates, the funding of such positions remains with the municipality.⁵ This is true even with respect to commissions that have optional powers.⁶ A commission does not have the authority to establish salaries for the chief or the subordinates in the department and the actual size of the police or fire department force rests within the discretion of the governing body.⁷ The municipal governing body is specifically authorized to fix the salaries of the chiefs and subordinates of both police and fire departments.⁸ However, once the salaries are established, they may not be decreased by the municipal governing body without a previous recommendation from the commission.⁹

Nevertheless, a commission's authority to hire a chief and appoint subordinates is extremely broad and provides commissions with significant discretion with respect to the hiring process. Thus, within these broad statutory parameters, commissions may fashion their hiring processes in line with local policy, best employment practices, and discrimination laws.

A. Chief

The hiring of a chief is important not only because the chief is the head of a department with critical supervisory and operational duties to ensure the municipality is safe, but also because the statutes give the chief significant and unique authority to hire and discipline department personnel. This requires that the chief possess a number of skills and qualities, including those technical skills necessary to effectively run a law enforcement or firefighting department, to supervise and lead personnel, to plan and budget for the short and long term, and to effectively work with the commission, the municipal governing body, and the public. Therefore, it is important that commissions take the time to establish appropriate selection criteria and processes in order to hire the best candidate for the position.

The only statutory guidance for the hiring of chiefs is that the commission shall appoint chiefs who shall hold their offices "during good behavior, subject to suspension or removal by the commission for cause."¹⁰ In some fire departments – most commonly volunteer organizations – the practice has been for the members of the department to "elect" a chief subject to confirmation by the commission. The League of Wisconsin Municipalities ("League") has opined that this procedure does not comport with the required statutory process for hiring a chief.¹¹ In addition, the appointment of a chief cannot be made subject to the confirmation of the municipal governing body.¹²

B. "Subordinates"

For other positions, the statutes provide that the chief "shall appoint subordinates subject to approval by the commission."¹³ The statute does not define "subordinates." The Wisconsin Supreme Court has held that a police captain was a subordinate whose selection was vested in the chief rather than in the commission.¹⁴

2. The applicable statutes refer to this body as the "board of police commissioners" and "board of fire commissioners." This chapter will use the term "commission" to refer to these bodies.

3. In this chapter, the word "chief" will refer to the police chief, fire chief, and/or combined protective services chief.

4. Wis. Stat. § 62.13(3) and (4)(a); Wis. Stat. § 61.65(3g)(d).

5. League of Wisconsin Municipalities Opinion "Police and Fire Commissions" 149; Wis. Stat. § 62.13(7).

6. *Id.*

7. League of Wisconsin Municipalities Opinion "Police and Fire Commissions" 128; Wis. Stat. §§ 62.12(8)(b) and 62.13(7).

8. Wis. Stat. §§ 62.13(7) and 61.65(3g)(d). This chapter will use the term "department" to refer to both police and fire departments, unless otherwise designated.

9. *Id.*

10. Wis. Stat. § 62.13(3).

11. League of Wisconsin Municipalities Opinions "Police and Fire Commissions" 129.

12. League of Wisconsin Municipalities Opinions "Police and Fire Commissions" 134.

13. Wis. Stat. § 62.13(4)(a).

14. *Walsh v. City of Richland Center*, 231 Wis. 265, 285 N.W. 791 (1939).

In addition, several League opinions have opined that volunteer firefighters are subordinates and must be selected in accordance with the statutory procedures for hiring subordinates.¹⁵ The League has also opined that since fire inspectors perform duties customarily associated with the functions of a fire department, a fire inspector is a “subordinate” for the purposes of the hiring statute.

Notwithstanding this limited legal guidance on the subject, it is generally recognized that “subordinates” consist of sworn law enforcement positions and fire department positions that involve fire suppression activities.¹⁶ The hiring of other positions within the department is not within a commission’s jurisdiction; for example, the hiring of clerical employees rests within a municipality’s hiring jurisdiction and practices, except for those municipalities whose commissions have optional powers.

C. Promotion

The filling of subordinate vacancies other than entry-level positions is within the chief’s authority and the statutes provide that “such appointments shall be made by promotion when this can be done with advantage, otherwise from an eligible list provided by examination and approval by the board and kept on file with the clerk.”¹⁷ The League has opined that the word “promotion” as used in this statute means “a progression to a higher step or level within” the department.¹⁸ The chief, rather than the commission, initially determines whether an appointment of a subordinate by promotion can be done “with advantage.”¹⁹ However, a municipality can require that appointments are to be made by promotion when there are qualified candidates in the department. This “neither specifies the promotion process, nor restricts a chief’s discretion in any way, other than making a chief’s selection subject to commission approval.”²⁰ Otherwise, if promotion from within the department cannot be “done with advantage” in the chief’s judgment, the promotion must be made by using an examination process to create an eligibility list.²¹

A municipality cannot ignore its existing approved eligibility list of candidates and fill a vacancy by promoting or transferring a municipal employee from another department.²² However, the Wisconsin Supreme Court has held that a collective bargaining agreement that requires the chief to promote the most senior qualified candidate is an appropriate limit on the chief’s discretion regarding promotions.²³ The court reasoned that “although the statute requires all subordinates to be appointed by the chief with the approval of the board, it does not, at least expressly, prohibit the chief or the board from exercising the power of promotion of a qualified person according to a set of rules for selecting one among several qualified candidates.”²⁴ The court, however, has also held that this statutory scheme does not contemplate that an arbitrator may overrule decisions that are specifically entrusted to the chief and commission.²⁵

2. Qualifications

A. Who Establishes

The chief has command of the department under the direction of the mayor or village board, and must obey their lawful written orders.²⁶ A commission without optional powers lacks authority to establish minimum qualifications for any position within the departments.²⁷ Rather, the municipal governing body establishes minimum qualifications for such positions.²⁸ The statutes do not authorize commissions to establish minimum qualifications, but merely refer to the commission’s role in examining whether applicants possess the required qualifications.

15. League of Wisconsin Municipalities Opinions “Police and Fire Commissions” 105, 99, 69 and 13.

16. These will be collectively referred to as “subordinates” consistent with their designation in statute.

17. Wis. Stat. § 62.13(4)(a).

18. League of Wisconsin Municipalities Opinions “Police and Fire Commissions” 107.

19. League of Wisconsin Municipalities Opinions “Police and Fire Commissions” 141.

20. *Baures v. North Shore Fire Dep’t*, 2003 WI App 103, 264 Wis. 2d 815, 664 N.W.2d 113.

21. *Id.*

22. League of Wisconsin Municipalities Opinions “Police and Fire Commissions” 107.

23. *Glendale Prof’l Policemen’s Ass’n v. City of Glendale*, 83 Wis. 2d 90, 264 N.W.2d 594 (1978).

24. *Id.*

25. *City of Madison v. Wisconsin Employment Relations Comm’n*, 2003 WI 52, 261 Wis. 2d 423, 662 N.W.2d 318.

26. Wis. Stat. §§ 62.09(13)(a), 61.34(1), Wis. Stat. § 62.09(8)(a) and (d).

27. League of Wisconsin Municipalities Opinions “Police and Fire Commissions” 149.

28. *Id.*

It is within this context that the statutes require commissions to create rules “calculated to secure the best service in the departments,” which must “provide for the examination of physical and educational qualifications and experience.”²⁹ The statutes further provide that “[t]he examination, including minimum training and experience requirements, shall be job-related in compliance with appropriate validation standards and shall be subject to the approval of the board and may include tests of manual skill and physical strength.”³⁰

B. The Standards

State statute establishes minimum qualifications for law enforcement officers.³¹ A municipality may, however, set higher standards.³² The Law Enforcement Standards Board (“LESB”) is tasked with establishing the minimum educational and training standards a person must satisfy to be employed as a law enforcement officer in a temporary, probationary, part-time, or permanent status.³³ The LESB notes that “[h]igher qualifications in addition to the minimum standards set by the LESB are strongly recommended where the employing authority is in a position to require them.”³⁴

All new law enforcement recruits must complete a preparatory program of at least 600 hours established by the LESB.³⁵ No person who has been convicted of a felony, any crime of domestic violence, or of any offense that, if committed in Wisconsin, could be punished as a felony may take part in the preparatory training program unless he or she has been granted an absolute and unconditional pardon for the crime.³⁶

An applicant for entry-level law enforcement positions must meet the following minimum qualifications:³⁷

- Possess a valid Wisconsin driver’s license or other valid operator’s permit recognized by the Wisconsin Department of Transportation as authorizing operation of a motor vehicle in Wisconsin prior to completing the preparatory training course. The results of a check of the issuing agency’s motor vehicle files constitutes evidence of driver’s status;
- Be at least 18 years of age at the time of appointment. A birth or naturalization certificate shall serve as evidence of applicant’s date of birth;
- Possess a Wisconsin high school diploma or a diploma issued by an out-of-state high school accredited by an appropriate agency of the state or have passed the general education development diploma test or any other test recommended by the Wisconsin Department of Public Instruction as indicating high school diploma level.
- Have not been convicted of any felony under the laws of the United States, Wisconsin, or any other state or jurisdiction unless the applicant has been granted an absolute and unconditional pardon;
- Have not been convicted of any misdemeanor crime of domestic violence unless the applicant has been granted an absolute and unconditional pardon;
- Possess either a two-year associate degree from a Wisconsin vocational, technical, and adult education district, or its accredited equivalent from another state, or a minimum of 60 fully accredited college-level credits. An applicant who has not met this standard at the time of employment shall meet this standard as a requirement of recertification by the LESB at the end of the applicant’s fifth year of employment as a law enforcement officer. At the request of an applicant and upon documentation of experiences that have enhanced the applicant’s writing, problem solving, and other communication skills, the LESB may waive a maximum of 30 college-level credits;

29. Wis. Stat. § 62.13(4)(c).

30. Wis. Stat. § 62.13(4)(d).

31. Wis. Stat. § 165.85(4)(a).

32. Wis. Stat. § 165.85(4)(f).

33. Wis. Stat. § 165.85(3)(b).

34. Wis. Admin. Code § LES 2.01(4).

35. Wis. Stat. § 165.85(4)(a)1.

36. Wis. Stat. § 165.85(4)(a)5.

37. Wis. Admin Code § LES 2.01(1).

- Be of “good character” as determined from a written report containing the results of the following:
 - The fingerprinting of the applicant with a search of local, state, and national fingerprint records.
 - A background investigation conducted by or on behalf of the employing agency.
 - Other investigations as may be deemed necessary to provide a basis of judgment on the applicant’s loyalty to the United States or to detect conditions which adversely affect performance of one’s duty as a law enforcement officer.
- Be able to perform the essential functions of the position with or without a reasonable accommodation;
- Undergo a medical assessment by a licensed physician, physician assistant, or nurse practitioner to verify that the applicant can meet the physical standards required of the position.³⁸ The applicant must also provide the examiner with a personal medical history. The medical assessment should be conducted no more than nine months prior to an applicant’s first date of employment;
- Complete a satisfactory oral interview with the employing agency; and
- Submit to a drug test for the presence of the following controlled substances or their metabolites: amphetamines, cannabis or cannabinoids, opiates, cocaine, and phencyclidine (PCP).³⁹ The drug test analysis may only be conducted by a laboratory certified by the United States Substance Abuse and Mental Health Services Administration (SAMHSA).⁴⁰ Drug testing must be conducted upon hire, and within 120 days prior to an applicant’s first date of employment.

There is not a similar set of state administrative standards that govern the minimum qualifications required for firefighters. However, the National Fire Protection Association (“NFPA”) is a national organization that establishes standards related to eliminating the risk and effects of fire. It has developed recommended standards for firefighters and has identified 14 essential job tasks. A municipality should evaluate these job tasks against the types of services that the department provides to the community to determine which tasks apply to its candidates and what their minimum qualifications must be.⁴¹ These tasks include:

- Responding to rescue operations in stressful conditions, including extremely hot and cold environments for prolonged periods of time while wearing personal protective ensembles and self-contained breathing apparatus;
- Wearing self-contained breathing apparatus, which requires the ability to tolerate increased respiratory workloads;
- Exposure to toxic fumes, irritants, particulates, and biological and non-biological hazards while wearing personal protective ensembles and self-contained breathing apparatus;
- (In some jurisdictions) wearing fire protective ensembles weighing at least 50 pounds or carrying equipment weighing an additional 20-40 pounds while climbing six or more flights of stairs;
- Wearing fire protective ensembles that will result in significant fluid loss that frequently progresses to clinical dehydration and can elevate core temperature to levels exceeding 102.2 degrees Fahrenheit;
- Wearing personal protective ensembles and self-contained breathing apparatus while searching, finding, and rescuing victims of various weights;
- Wearing personal protective ensembles and self-contained breathing apparatus while carrying water-filled hoses for various distances and navigating various obstacles;

38. As more fully set forth below, a medical examination can only be required of an applicant after a conditional offer of employment has been made.

39. Wis. Admin Code § LES 2.02.

40. *Id.*

41. NFPA 1582, *Standard on Comprehensive Occupational Medical Program for Fire Departments*.

- Wearing personal protective ensembles and self-contained breathing apparatus while climbing ladders, operating from heights, walking, or crawling in the dark along narrow and/or uneven surfaces that might be wet or icy and may present electrical power hazards;
- Unpredictable rescue situations that might include long periods of extreme physical exertion without warm-up, periods of rest, meals, or access to medication or hydration;
- Operating fire apparatus or emergency vehicles in emergency modes with lights and sirens;
- Critical, time-sensitive problem solving during extreme physical exertion in stressful and hazardous environments;
- Ability to communicate while wearing protective gear in conditions with low visibility and high amounts of background noise;
- Functioning as an integral part of a team in situations where a member becomes incapacitated; and
- Working both daytime and nighttime shifts that may exceed 12 hours.⁴²

In addition to establishing minimum standards for subordinates, many municipalities used to require employees to reside within the municipality. State law no longer allows this. A municipality may not require an employee, as a condition of employment, to reside within any jurisdictional limit.⁴³ However, a municipality may impose a residency requirement on law enforcement, fire, or emergency personnel that requires such personnel to reside within 15 miles of the jurisdictional boundaries of the municipality.⁴⁴ Departments that have a collective bargaining unit are required to bargain any residency requirements, which can be different than set forth in statute. Commissions with optional powers have the authority to establish residency requirements within the context of the law and any collective bargaining agreement; otherwise, that authority rests with the municipality.⁴⁵

3. The Hiring Process

The process for hiring a chief and subordinates should be part of the commission's bylaws. This process should include the steps listed below. Prior to commencing a hiring process, a commission should also develop criteria by which it will judge the applicants through each phase of the hiring process.

A. Authority to Hire

Even though the hiring process is within the commission's jurisdiction, funding for the process and positions must come from the municipality. A municipal governing body is authorized to fix the salaries of the chief and subordinates.⁴⁶ Once established, these salaries cannot be decreased without a previous recommendation from the commission.⁴⁷ Therefore, prior to the start of the hiring process, commissions must make sure that they have the financial authority to hire for a vacant or new position and to fund the hiring process by which that will be accomplished. This will require authorization either from the existing budget or from the municipal governing body and should be coordinated prior to the beginning of the hiring process.

B. Meetings

Commissions may meet in closed session with respect to each phase of the hiring process under the Wisconsin Open Meetings Law.⁴⁸ The agenda should be posted to include language that "the commission will consider moving into closed session pursuant to Wis. Stat. § 19.85(1)(c) for the purposes of considering employment, promotion or performance evaluation data with respect to the filling of a vacant department position."

42. Id. § 5.11.

43. Wis. Stat. § 66.0502(3)(a).

44. Wis. Stat. § 66.0502(4)(b).

45. League of Wisconsin Municipality Opinions "Police and Fire Commissions" 140 and 152.

46. Wis. Stat. §§ 61.65(3g), 62.13(7).

47. Id.

48. Wis. Stat. § 19.85(1)(c). For further discussion, see Chapter IV.

C. Job Description

At the beginning of every hiring process, the commission should review and revise, if necessary, the job description for the vacant position(s). A job description is an important management tool because it serves as a basis for:

- Establishing minimum qualifications to be met by applicants seeking appointment to a department;
- Deciding what type of tests might be appropriate in screening applicants;
- Developing job announcements used as part of the recruitment process;
- Reviewing and screening applications submitted by applicants to ensure only qualified applicants will be considered;
- Evaluating the performance of the individual appointed to a position; and
- Evaluating requests for reasonable accommodations under the Americans with Disabilities Act of 1990 (ADA) and the disability provisions of the Wisconsin Fair Employment Act.

The format of job descriptions will vary, but all job descriptions should include the following elements:

- Job title;
- Identification of the individual to whom an employee reports;
- A brief description of the position, including the level and type of supervision required;
- Exempt/non-exempt status under the Fair Labor Standards Act;
- Minimum qualifications the employee must have;
- Knowledge, skills, and abilities required to perform duties assigned to the position;
- Essential functions or basic duties an individual in the position is expected to perform;
- Other functions or duties that, while not essential, are performed by an individual in the position;
- The physical requirements of the position (e.g., lifting, walking, standing, sitting, etc.); and
- The physical environment in which a person in the position usually works, as well as environmental or physical conditions that may be encountered.

A sample job description is in the Appendix.

D. Veterans' Preference

The commission must also factor in an applicant's veteran status by giving veterans (and, under some circumstances, their spouses) additional credit in the hiring process.⁴⁹ One way to accomplish this is to add designated points in the applicant's written examination as follows:

- For a veteran, 10 points be added to the score;
- For a disabled veteran, 15 points be added to the score;
- For a disabled veteran whose disability is at least 30 percent, 20 points be added to the score;
- For the spouse of a disabled veteran whose disability is at least 70 percent, 10 points be added to the spouse's score;

49. Wis. Stat. §§ 62.13(4)(d), 230.16(7m).

- For the un-remarried spouse of a veteran who was killed in action, 10 points be added to the spouse's score; and
- For the un-remarried spouse of a veteran who died of a service-connected disability, 10 points be added to the spouse's score.⁵⁰

E. Affirmative Action

A commission should note in its hiring documents that it will hire the most qualified applicant for a vacancy regardless of sex, race, religion, creed, color, national origin, age, disability, sexual orientation, ancestry, marital status, arrest or conviction record, military service, or any other legally protected status.

F. Application

Applicants should be required to fill out an application in order to be considered for employment. The application process is meant to determine which applicants meet the minimum qualifications for the position; therefore, the application should be designed with that purpose in mind. A copy of the online application developed by the Wisconsin Department of Justice is in the Appendix.

An application should not solicit information that would disclose whether an applicant belongs to a classification that is protected under statute from discrimination in hiring (e.g., age, race, religion, etc.). The ADA prohibits a municipality from making disability-related inquiries prior to a conditional offer of employment.⁵¹ A “disability-related inquiry” includes:

- Asking whether the applicant has (or ever had) a disability or how the applicant became disabled or inquiring about the nature or severity of the applicant's disability;
- Asking the applicant to provide medical documentation regarding the applicant's disability;
- Asking the applicant's co-worker, family member, doctor, or another person about the applicant's disability;
- Asking about the applicant's genetic information;
- Asking about the applicant's prior workers' compensation history;
- Asking the applicant whether the applicant is currently taking any prescription drugs or medications, whether the applicant has taken any such drugs or medications in the past, or monitoring the applicant's taking of such drugs or medications; and
- Asking the applicant a broad question about the applicant's impairments that is likely to elicit information about a disability.⁵²

Under Wisconsin law, a municipality, when making a hiring decision, cannot use the fact that an applicant is or has been subject to an “arrest,” which includes being investigated for a crime.⁵³ A municipality also cannot consider the fact that an applicant is subject to a pending criminal charge or has a conviction record unless the nature of that charge or conviction is substantially related to the subordinate position.⁵⁴ However, a felony conviction, whether substantially related to the position or not, automatically disqualifies an applicant from consideration as a law enforcement officer.⁵⁵

50. Wis. Stat. § 63.08(1)(fm).

51. U.S. Equal Emp. Opportunity Comm'n, Notice No. 915.002, Enforcement Guidance: disability-related inquiries and medical examinations of employees under the Americans with Disabilities Act (ADA) (July 27, 2000).

52. *Id.*

53. Wis. Stat. §§ 111.32(1), 111.335(2)(a).

54. Wis. Stat. § 111.335(3)(a)1.

55. Wis. Admin Code § LES 2.01(l)(c).

A municipality, therefore, can include on the application a question as to whether an applicant is subject to a pending criminal charge or has a conviction record for purposes of assessing whether any such charge or conviction substantially relates to the position so as to disqualify the applicant from further consideration.⁵⁶ If the municipality uses this question on the application, it must include a statement that the existence of such arrest or conviction will not automatically disqualify the applicant from consideration for the position. If an applicant answers the question untruthfully, the municipality may remove the applicant from further consideration (or if hired, terminate the employee), without such action being considered to be based upon an arrest or conviction record.⁵⁷

Applicants should be required to submit with their application a signed release authorizing the commission to conduct a background investigation. They should also be advised that misrepresenting any material fact contained in the application will be sufficient cause for excluding the applicant from the examination process, removing the applicant's name from the eligibility list, or discharging the employee.

G. Announcement

The announcement of a hiring process to fill a vacancy depends on whether it is for an entry-level position or a promotion. The type of announcement used for a promotional process depends on whether the commission has adopted rules mandating an internal promotion or permitting consideration of external applicants. Promotions may also be subject to collective bargaining agreement provisions requiring certain promotional processes for bargaining unit members if the promotion is to another bargaining unit position, including promotion by seniority and mandatory posting times.

If an external recruitment is used to fill a vacancy, the municipality should advertise the municipality's desire to fill the vacancy. This should be done with a job announcement that includes the position name, the wage or salary, and the position's duties and minimum qualifications. The announcement should also describe where and how to access applications and with whom and when they must be filed. A sample posting is contained in the Appendix.

There are several different means by which to advertise a hiring process for a job vacancy. Most commissions announce an intent to fill entry-level vacancies by posting job announcements in accessible locations within a community and mailing copies to neighboring units of government, employment agencies, and secondary schools offering public safety training programs. The Wisconsin Department of Justice oversees the Wisconsin Law Enforcement Network (WILEnet), which provides information regarding law enforcement employment, standards, and training and also serves as a source for publicizing job openings. League members may place classified ads on the League's website at no cost.

H. Tests/Examinations

At the end of the application period, each application should be screened for completeness and reviewed to determine whether the applicant meets the minimum requirements for the position. Those who do should be forwarded for "examination." If an application reveals that the applicant cannot meet the eligibility requirements or the qualifications of the position, the commission or its designee should reject that application, without further examination.

Commissions have wide latitude to determine the type of tests and examinations to be used in the hiring process and the order in which they occur. The examination process is typically a multi-stage assessment process that tests an applicant's capacity to successfully perform the position's duties and helps the commission determine which of the minimally qualified applicants are best suited for the position.

56. *Miller Brewing Co. v. Dep't of Indus., Labor & Human Relations*, 103 Wis. 2d 496, 504, 308 N.W.2d 922 (Ct. App. 1981).

57. *Rase v. Interim Health Care*, ERD Case No. CR 200900791 (LIRC July 16, 2013).

A number of general principles govern the examination process:

- All examinations should be carried on under the commission's supervision. However, the commission may designate any suitable municipality, state agency, or person to conduct or assist in conducting the examinations;
- Any applicant who fails a pass/fail examination should be removed from the process at that point and denied the opportunity to participate in further examinations;
- Reasonable accommodations must be made for an applicant with a disability under federal or state law for any examination. Application forms should advise applicants of this right;
- Each stage of the examination process should be administered the same for all applicants eligible for that stage, except for those applicants who are provided with a reasonable accommodation in the examination process as a result of a disability;
- The commission should establish the criteria that will be used to assess whether applicants pass an examination prior to administering the examination;
- Each applicant taking an examination must follow the instructions given by the person conducting the examination;
- Information relative to an applicant's scores must be kept strictly confidential and should not be divulged, except for purposes related to administering the selection process;
- Applicants, commission members, or department employees should not assist any applicant during the examination process. A violation of this rule warrants removal of an applicant who has been improperly assisted from the hiring process. Any commission member or department employee who violates this rule should be subject to appropriate sanctions;
- No applicant should be given a second or special examination, unless it is shown to the commission's satisfaction that the applicant's failure to take or complete the test was due to a manifest error or mistake for which the commission or its designated assistants are responsible. The commission may, in the interest of fairness, void the examination and re-test all applicants; and
- Examination documents should be retained by the commission or its designated representative consistent with the municipality's record retention policy.

The following are the typical stages of the examination process.

i. Written Test

There are a number of different written tests that can be used to examine applicants for positions in law enforcement and fire protection. Before settling on a particular type of exam, a commission must decide what it wants the test to measure. Achievement tests are commonly used to learn if an individual has attained and can apply specific kinds of information or skills related to job performance. Achievement tests vary in what they are intended to measure, so tests used in selecting police officers and firefighters are likely to be quite different. For example, language comprehension and problem-solving skills may be emphasized in tests designed for entry-level police officers; knowledge of mechanics, math, and chemistry may be emphasized in tests for entry-level firefighters. Achievement tests are usually objective in nature, easy to score (multiple choice questions are commonly used), and inexpensive to administer.

The test results are usually reported as a numerical score, which would include the addition of any veterans' preference. The commission must determine beforehand how it will use the test score. For example, the written test can be used as a pass/fail vehicle for moving applicants to the next phase or it could be one numerical component in the scoring process for all of the examinations.

Commissions sometimes require applicants to answer a series of written questions relevant to the job and the applicants' interest in the position. This is a valuable tool if the commission wants to judge an applicant's writing ability and is usually scored by a panel using a pre-determined rubric.

ii. Oral Interview

The purpose of an oral interview is to assess individual skills and qualities that may be difficult to measure using other methods. When planned, structured, and conducted carefully, interviews can help those involved in the selection process learn more about:

- Personal skills an employer considers important, such as an applicant's ability to communicate effectively;
- Personal qualities an employer considers important, such as an applicant's attitude toward work and authority;
- An applicant's experience and interests beyond those reflected in an application form and resume; and
- An applicant's reasons for seeking appointment as a public employee, as well as the applicant's expectations and goals.

A commission's approach to conducting interviews may depend on the number of applicants to be interviewed. As part of the interview process, a commission should:

- Develop questions using the job description that will best explore an applicant's job-related skills and qualities. The questions should be open-ended and, if possible, explore an applicant's past experience with respect to the skill or quality explored;
- Refrain from using questions that require a person to disclose information concerning their protected status. The same rules that prohibit disability-related inquiries in applications also apply in the interview phase;
- Determine the composition of the interview panel. Depending on the position, a panel of department supervisors is generally appropriate. For promotional positions, departments sometimes use supervisors from other departments to serve as the panel to bring a different level of expertise and to eliminate any perception of bias. The commission should also determine whether the commission or any of its members will be a part of any interview panels. The same panel should interview each applicant;
- Ask each applicant the same questions. Members of an interview panel are not limited to asking only the questions each has been assigned. Follow-up questions may be appropriate or necessary to help an applicant clarify a response;
- Allow sufficient time for each interview. The amount of time should let the panel acquaint the applicant with the purpose of the interview and how it will be conducted, conduct the interview, give the applicant a chance to offer additional information and ask questions about the position, close the interview, and give members of the interview panel time to complete forms used to record impressions from the interview;
- Determine how to evaluate the interview. The interview can be scored several different ways. One common way is to have each interviewer score each question and have the commission assess applicants' total scores. If this method is used, a rubric should be developed to guide the interviewers in their scoring process. The interviewers should complete their scoring independently. Another way to evaluate the applicants' interviews is for the interviewers to rank them from best to worst.

iii. Physical Capabilities Exam

Because both law enforcement and firefighting duties require significant physical abilities, commissions must make sure that applicants are examined to determine whether they meet the physical requirements of the job. Such testing, however, may be harder for female applicants to pass depending on the nature of the test. The Civil Rights Act of 1964 prohibits examinations that have a disparate impact on women unless the commission can demonstrate that the examination was job-related and consistent with business necessity.⁵⁸ Therefore, commissions using a physical examination test should make sure the test is validated for purposes of compliance with the Civil Rights Act of 1964.

With respect to law enforcement officers, the Wisconsin Department of Justice Training and Standards Bureau contracted with a company to conduct a study to determine the physical tasks needed to perform the duties of an entry-level law enforcement officer in Wisconsin. That company translated the physical tasks into a Physical Readiness Test. An individual who can pass the Physical Readiness Test is considered able to perform the physical duties of a Wisconsin patrol officer. Those criteria are as follows:

Fitness Standards: State of Wisconsin		
Test	Entrance Standards	Exit Standards
Vertical Jump	11.5 inches	14 inches
Agility Run	23.4 seconds	19.5 seconds
Sit-ups	24	30
300m run	82 seconds	68 seconds
Push ups	18	23
1.5 mile run	20:20 minutes	16:57

With respect to firefighters, the most common examination is the Candidate Physical Ability Test (CPAT) licensed by the International Association of Firefighters. The CPAT is a timed test that measures how candidates handle eight separate physical tasks or functions, designed to mirror tasks that firefighters would have to do on the job. The CPAT is administered throughout the state and applicants are typically asked to provide evidence of passage within a certain time frame.

I. Eligibility List

Once the examinations are completed, the commission should create an eligibility list. State law does not prescribe how eligibility lists are created, except to strongly imply that such lists are the result of testing and an evaluation of each candidate's experience and other qualifications for a position.⁵⁹ The method by which a commission establishes a certification list should be established prior to the beginning of the hiring process and should factor in each component of the examination process. The list should identify those applicants that the commission believes are most qualified for the position. The number of those certified should take into account the number of vacancies that are being filled, the number of applicants on which the commission wants to perform background checks, and how many interviews the chief will conduct.

Upon the adoption of the eligibility list, the chief is required to hire only those on the list. The commission will need to determine how long to keep the list valid before engaging in another competitive examination process. Typically, lists remain valid for at least one year. The commission will also need to determine how the vacancy is filled from the eligibility list. Commissions can rank the applicants on the list and require the chief to select in the order established by the rankings. More typically, commissions establish the list and permit the chief to interview the applicants on the eligibility list and choose the applicant the chief prefers without having to return to the commission to secure final approval for the hiring of that applicant, pending satisfactory background check and physical and psychological examinations.

58. 42 U.S.C. § 2000e-2(k)(1)(A)(i).

59. Wis. Stat. § 62.13(4)(c).

J. Background Check

The commission will need to decide how many applicants on the eligibility list should be the subject of a background check. Given the cost and time involved in the background check process, it is not unreasonable to perform a background check only on the applicant the chief selects to fill the vacancy.

The background check should explore an applicant's work history and references, educational history, and social and personal history through relevant interviews. It should also include a criminal background check. This can be obtained from the Criminal History Unit of the Wisconsin Department of Justice, which is responsible for maintaining Criminal History Record Information, including demographic information, arrest and charge information, and related final disposition reports from the District Attorney/Prosecutor, Clerk of Court, municipal court, or correctional agencies.

The background check must include a test for the presence of illegal drugs. The drug test analysis must only be conducted by a laboratory certified by SAMHSA. Prior to sending an applicant for drug testing, ensure that the test site (hospital or clinic) utilizes a SAMHSA-certified drug lab for the specimen analysis.

K. Conditional Offer of Employment

Upon successful completion of the background check, the chief (or commission) may make a conditional offer of employment. The ADA bars employers from ordering job applicants to undergo a medical examination until after an offer of employment has been made. Therefore, an offer of employment must be made conditional on the results of a medical and psychological examination. A sample conditional offer of employment is found in the Appendix.

The NFPA recommends that a medical evaluation be performed before an applicant for a firefighting position can begin training programs or participate in department emergency response activities.⁶⁰ The evaluation must include a review of the applicant's medical history, physical examination, and laboratory tests to detect any medical conditions that could affect the applicant's ability to perform his or her essential job tasks.⁶¹ NFPA provides a list of conditions affecting various areas of the body that fall into either Category A or B. The physician will review the applicant's medical conditions to determine whether those conditions will prevent the individual from safely performing the applicant's essential job tasks.⁶² The physician will rate the applicant's conditions that could affect the applicant's ability to safely perform essential job tasks in either Category A or Category B under NFPA standards.⁶³ If an applicant has any medical conditions falling into Category A, the applicant may not be certified as meeting the medical requirements of NFPA 1582.⁶⁴ If an applicant has medical conditions falling into Category B, the applicant will only be certified as meeting the medical requirements under NFPA 1582 if the applicant can perform the applicant's essential job tasks without significant health or safety risks to the applicant, other firefighters, or the public.

There are no comparable national standards for police officers. A commission that chooses to adopt its own medical examination standards should seek the advice of professionals in the fields of medicine and occupational health.

State law provides that if a firefighter dies or becomes disabled and it is claimed that death or disability was the result of a heart or respiratory impairment or disease, the qualifying medical examination given prior to the firefighter's entry into employment will be used as a basis for settling the claim.⁶⁵ If the examination showed no evidence of heart or respiratory impairment or disease, then a presumption must be made that the firefighter's death or disability was job-related.⁶⁶ This provision applies to claims filed by individuals who have served as firefighters for at least five years and have engaged in duties related to firefighting at least two-thirds of their working hours.⁶⁷

60. NFPA 1582, *Standard on Comprehensive Occupational Medical Program for Fire Departments*, § 6.1.

61. *Id.* §§ 6.1.1. and 6.2.3.

62. *Id.* § 6.1.2.

63. *Id.* § 6.2.1.

64. *Id.* § 6.2.2.

65. Wis. Stat. § 891.45(2).

66. *Id.*

67. Wis. Stat. § 891.45(1)(b).

In addition to a medical examination, consideration should be given to requiring an applicant to undergo a psychological examination. Psychological tests assess an individual's traits, attitudes, interests, preferences, or other behavioral characteristics. The tests are usually created by highly trained specialists in the fields of testing and human behavior. Interpreting tests is also the domain of specialists who score and explain the meaning of results, or they may provide a detailed set of instructions permitting those who administer a test to score and interpret the results. Psychological testing is based, at least in part, on an assumption that behavioral characteristics, such as a tendency to act in a dominant or submissive manner, or a preference to work alone instead as part of a group, can be accurately gauged and judgments made about an individual.

L. Offer

Once an applicant has satisfied the provisions of the conditional offer, the appointment can be formalized by the commission, either by deferring to the chief's appointment from the eligibility list or taking formal action to approve the chief's appointment.

M. Probationary Period

A chief cannot be appointed subject to a probationary period. Rather, the chief holds office "during good behavior."⁶⁸ It is generally understood that a chief can only be removed under the provisions of Chapter 62, which cannot be subverted by means of a probationary period.⁶⁹ Furthermore, a chief cannot be appointed for a limited term.⁷⁰

Hiring a subordinate on a probationary basis allows a department the opportunity to evaluate the subordinate's skills and character during a training period.⁷¹ Entry-level law enforcement officers who have not yet completed the preparatory program and have not been certified by the LESB can only be hired on a 12-month probationary basis.⁷² A probationary subordinate may exercise law enforcement powers during the probationary period, but that period may not exceed 12 months from the subordinate's first day of employment.⁷³ A subordinate may be certified as an officer if the recruit successfully completes the preparatory program within the subordinate's original probationary period.⁷⁴ The LESB may extend a subordinate's original probationary period for a period of time that it deems appropriate if the subordinate or department makes a showing of good cause.⁷⁵ Once a subordinate completes the training and is certified, then the recruit can be considered a non-probationary employee. The municipal governing body has the authority to establish a probationary period for firefighters and to establish a probationary period for law enforcement officers longer than 12 months, subject to extension.

68. Wis. Stat. § 62.13(3).

69. *Id.*; League of Wisconsin Municipalities Opinions "Police and Fire Commissions" 130.

70. Wis. Stat. § 62.13(3); League of Wisconsin Municipalities Opinions "Police and Fire Commissions" 129.

71. *Kaiser v. Bd. of Police & Fire Comm'rs*, 104 Wis. 2d 498, 311 N.W.2d 646 (1981).

72. Wis. Stat. § 165.85(4)(a)3.

73. *Id.*

74. Wis. Stat. § 165.85(4)(a)3h.

75. Wis. Stat. § 165.85(4)(a)6.

Chapter III

Discipline¹

1. This chapter was written by attorneys Steven Zach, Catherine Wiese, and Julia Potter of Boardman & Clark LLP.

1. Disciplinary Authority²

Commissions³ are granted unique and exclusive power over aspects of police and fire departments' disciplinary processes. A commission's authority to discipline is governed by Wis. Stat. § 62.13(5) with respect to terminations, reductions in rank, and suspensions ("statutory disciplinary process").⁴ The statutory disciplinary process involves the filing of formal charges against the chief or subordinate with the commission. Charges may be filed by the chief, a member of the commission, the commission as a whole, or an aggrieved person.⁵ The charges must be filed with the commission president and served upon the accused. In order to discipline an accused based upon the charges, the commission is required to hold a hearing to determine whether just cause exists to discipline the accused party. "Just cause" is defined by statute and consists of seven factors which the commission must find in order to discipline the accused.⁶

Municipalities that are not required to establish a commission cannot impose discipline without setting up a committee or appointing a person to function in place of a commission.⁷ The committee or person, however, must follow the same statutory disciplinary process that commissions must follow. Thus, the provisions in this chapter apply to such committees and appointed persons.

A. Discipline Within the Scope of Commission Authority

i. Cities over 4,000 in population

A chief may suspend an entry-level, non-probationary subordinate⁸ for just cause, as defined in Wis. Stat. § 62.13(5)(em), but must report the suspension to the commission.⁹ A subordinate is not entitled to a hearing on the suspension unless the subordinate requests that the chief file charges, which then triggers the hearing process.¹⁰ The process is different with respect to reductions in rank and terminations. With respect to those forms of discipline, a chief (or other party identified by statute) must first file charges with the commission.¹¹ Absent agreement by the subordinate, a suspension,¹² reduction in rank, or termination of a subordinate may only be imposed after charges have been filed by the chief or others (as set forth below) and the commission has held a hearing using the statutory disciplinary process.¹³

Commissions have the sole authority to suspend or remove a chief for cause.¹⁴ If charges are filed against a chief seeking the chief's suspension or removal, the commission's disciplinary process is the same as for subordinates and requires a hearing.¹⁵

ii. Cities under 4,000 in population

If a city with a population under 4,000 has not created a commission and has not entered into an individual or collective bargaining agreement that provides for a fair review of a proposed suspension, reduction in rank, or termination, the city must set up a committee of no fewer than three members or appoint a person ("appointed individual") to function in place of a commission in the statutory disciplinary process. Neither the appointed individual nor any member of the committee may be an elected or appointed official or city employee.¹⁶ The committee or appointed individual and the hearings are governed by the statutory disciplinary process.¹⁷ If the city has entered into a collective bargaining agreement or individual contract, the disciplinary process will be as set forth in that agreement.

2. This Chapter draws in part from an article written by Paul W. Schwarzenbart, Partner, Stafford Rosenbaum LLP which appears in "The Municipality" and was reprinted as League of Wisconsin Municipalities Police and Fire Commissions 167.

3. "Commission" is used to refer to a police, fire, and police and fire commission and any hearing officer or committee serving a similar function under statute.

4. Termination, reduction in rank, and suspension will be referred to jointly as "discipline" unless otherwise specified. Commissions with optional powers have authority to impose other forms of discipline as discussed below.

5. Wis. Stats. § 62.13(5)(b).

6. Wis. Stat. § 62.13(5)(em).

7. Wis. Stat. §§ 61.65(1)(am) and 62.13(6m).

8. "Subordinate" is used to refer to both sworn law enforcement officers and fire fighters who engage in fire suppression activities. Because entry-level probationary subordinates are subject to different disciplinary standards and rules than non-probationary subordinates, the use of "subordinate" will refer to non-probationary employees subject to the statutory disciplinary process. In addition, "subordinates" does not include those subordinates under probation as a result of promotion because the disciplinary rules with respect to that category of employees are different, as set forth below.

9. Wis. Stat. § 62.13(5)(c).

10. *Id.*

11. Wis. Stat. § 62.13(5)(b) and (5)(i).

12. Future references to suspensions assume the filing of charges by the chief or commission.

13. Wis. Stat. § 62.13(5)(em).

14. Wis. Stat. § 62.13(3).

15. Wis. Stat. § 62.13(5)(j).

16. Wis. Stat. § 62.13(6m).

17. *Id.*

iii. Villages

A village with a population of 5,550 or more that creates its own police department must create a police commission.¹⁸ A village with a population of 5,000 or more that creates a joint police department with another municipality must create a joint commission.¹⁹ A village with a population of 5,500 or more that creates its own fire department or a joint fire department must create a commission or joint commission, respectively.²⁰ All other villages must set up a committee of no fewer than three members or appoint an individual to function in place of a commission in the statutory disciplinary process.²¹ Neither the appointed individual nor any member of the committee may be an elected or appointed official or village employee.²² Village commissions, committees, and appointed individuals are governed by the statutory disciplinary process.²³

iv. Commission authority

A commission may adopt administrative rules to guide its disciplinary process so long as those rules do not conflict with the statutory disciplinary process.²⁴ For example, a commission may adopt a rule permitting a hearing officer to conduct initial and evidentiary hearings and to make reports to the commission on the hearing officer's recommendations, so long as the rule ensures that the ultimate decision-making authority remains with the commission.²⁵ Such administrative rules are typically outlined in a commission's bylaws. In a department that has a collective bargaining agreement with some or all of its subordinates, the collective bargaining agreement cannot provide for the right to seek arbitration of a disciplinary decision in place of a hearing before the commission.²⁶ The current status of the law is unclear as to whether, in addition to a hearing under the statutory disciplinary process, a chief or subordinate may file a grievance and be entitled to a hearing under a municipality's grievance process required pursuant to Wis. Stat. § 66.0509(1m).

Commissions with optional powers also have ultimate authority over discipline that is less than a suspension, reduction in rank, or termination, subject to any delegation of that authority to the chief or under the terms of a collective bargaining agreement.

With respect to the interface with other employment laws, a commission has exclusive statutory authority to review disciplinary actions and any claim that a disciplinary termination is discriminatory in violation of the Wisconsin Fair Employment Act must be raised before the commission. The Wisconsin Department of Workforce Development cannot exercise jurisdiction over a discrimination complaint arising out of a commission's decision to terminate a chief or subordinate.²⁷

B. Discipline Not Within the Scope of Commission Authority

The statutory disciplinary process only applies to suspensions, reductions in rank, and terminations. Except for commissions with optional powers, other forms of discipline, such as verbal or written warnings, are not within the commission's jurisdiction.²⁸ In addition, the commission's authority applies only to disciplinary actions.²⁹ For example, the termination of a subordinate on the basis that the individual cannot perform the essential functions of the job because of a permanent physical or mental health condition is not a disciplinary action and following the statutory disciplinary process is not required in such circumstances.

Both chiefs and subordinates may waive their rights to the statutory disciplinary process. This is common in disciplinary matters, which are regularly resolved by the parties entering into a severance agreement that provides for a voluntary resignation, a full release of claims against the municipality, payment of a severance package, and the waiver of the right to a statutory hearing.

18. Wis. Stat. § 61.65(1)(b)2.

19. Wis. Stat. § 61.65(1)(b)1.b.

20. Wis. Stat. § 61.65(2)(b).

21. Wis. Stat. § 61.65(1)(am).

22. *Id.*

23. Wis. Stat. §§ 62.13(6m), 61.65(1)(am) and (3g). The statutes are unclear whether villages under 5,500 in population are required to have commissions with respect to their fire departments and/or whether the statutory disciplinary process applies to fire departments in those villages.

24. Wis. Stat. § 61.13(5)(g).

25. *Conway v. Bd. of the Police & Fire Comm'rs of the City of Madison*, 2003 WI 53, 262 Wis. 2d 1, 662 N.W.2d 335.

26. *City of Janesville v. Wis. Emp't Relations Comm'n*, 193 Wis. 2d 492, 535 N.W.2d 34.

27. *City of Madison v. State Dep't of Workforce Dev.*, 2003 WI 76, 262 Wis. 2d 652, 664 N.W.2d 584.

28. Wis. Stat. § 62.13(5).

29. *Kraus v. City of Waukesha Police & Fire Comm'n*, 2003 WI 51, 261 Wis. 2d 485, 662 N.W.2d 294.

Newly-hired, probationary subordinates who do not successfully complete their probation are not within the scope of the statutory disciplinary process.³⁰ A probationary subordinate does not have a property interest in his or her probationary position and only has a unilateral expectation of completing the probationary period and being hired as a permanent officer.³¹ Therefore, a probationary subordinate who does not successfully complete probation may be dismissed at any time without being given a reason for the dismissal.³²

If a subordinate is promoted on a probationary basis and is subject to disciplinary charges during that probationary period, the promotion may only be taken away from the subordinate through a just cause hearing under the statutory disciplinary process.³³ However, a promoted subordinate who does not successfully complete the probationary period for non-disciplinary reasons may be returned to the subordinate's former rank without either a statutory or other due process hearing.³⁴

2. Initiation of Disciplinary Proceedings

A. Who May File a Charge

Charges seeking the discipline of a subordinate may be filed by the chief, a commission member, the commission as a body, or any aggrieved person.³⁵ The League has opined that the term "aggrieved person" is construed broadly to include any aggrieved individual, partnership, association, or body politic or corporate.³⁶ A commission rule that defines an "aggrieved person" too narrowly may be challenged. For example, a commission rule defining an "aggrieved person" as "someone who is directly affected by the alleged misconduct, or the parent or legal guardian of a minor who is directly affected by the alleged misconduct" was found to be unduly restrictive.³⁷

In situations involving charges against a subordinate, the chief generally serves as the charging party (unless the charges are filed by an "aggrieved person"). If the chief is the subject of charges, the statute contemplates that the charges are filed by the mayor or village president.³⁸ Because the commission serves in a quasi-judicial capacity in its role in reviewing evidence and determining whether to sustain charges, it is generally inadvisable for the commission or any commission member to be the charging party. Rather, the commission should delegate the investigation of the facts relevant to the situation to a third party who reports to the mayor or village president. That report would serve as the basis for the charges and form the content of the prosecution at the hearing.

If the commission is the charging party, the commission should delegate its prosecutorial role to a special counsel. A commission member who prosecutes a charge should act solely in that capacity and should not participate in any aspect of the commission's role in the process.

B. Against Whom May Charges Be Filed

The statutory disciplinary process only applies to the chief and subordinates. It does not apply to disciplinary actions involving non-sworn police officers or fire department employees not engaged in fire suppression activities. Accordingly, statutory charges cannot be filed against these other employees, although they may still be subject to formal or informal complaints which should be investigated and handled by the chief.

30. *Kaiser v. Bd. of Police & Fire Comm'rs of the City of Waukesha*, 104 Wis. 2d 498, 311 N.W.2d 646 (1981).

31. *Id.*

32. *Id.*

33. *Antisdell v. City of Oak Creek Police & Fire Comm'n*, 2000 WI 35, 234 Wis. 2d 154, 609 N.W.2d 464.

34. *Kraus*, 2003 WI 51, 261 Wis. 2d 485, 662 N.W.2d 294.

35. Wis. Stat. § 62.13(5)(b).

36. League of Wisconsin Municipalities Opinion "Police and Fire Commissions" 147; Wis. Stat. § 990.01(26).

37. *State ex rel. Castaneda v. Welch*, 2007 WI 103, ¶ 60, 303 Wis. 2d 570, 735 N.W.2d 131.

38. Wis. Stat. §§ 62.13(5)(j), 61.65(3g)(d)2.

C. What Must a Charge Contain

Charges must be in writing.³⁹ Disciplinary charges must contain sufficient detail to allow the chief or subordinate⁴⁰ to prepare an adequate defense.⁴¹ Typically, commission bylaws specify the form required for a charge. Ideally, the charges should be framed in light of the seven “just cause” standards discussed below. The charges should identify the department rule or order allegedly violated, describe any investigation of the charges, and set forth the factual allegations supporting the charges.

D. Service

A charge must be filed with the commission president.⁴² The statute does not specify what “filed” means and, ideally, commission bylaws should specify how this is accomplished. The best practice is to require the charges to be personally given to the commission president.

Following service upon the commission president, a copy of the charge must “be served upon the person charged.”⁴³ The statute sets no time frame for service upon the accused and, likewise, does not specify the manner of service. The manner of service should be established by commission bylaws and personal service is the best practice. One way personal service can be accomplished is by having either the chief or the commission president personally provide the accused with a copy of the charges.

With respect to the timing of service on the accused, the absence of a statutorily required time frame gives the commission flexibility to engage in a preliminary assessment of the charges, as set forth below, prior to accomplishing service. Service upon the accused establishes the statutory time parameters for when the hearing must be held,⁴⁴ absent agreement to extend the time by the parties.

E. Attorneys

The hearing potentially involves two attorneys hired by the municipality; one to represent the charging party (if other than a member of the public) and one to represent the commission. Municipalities have the authority to employ and compensate special counsel for both, and the commission and the municipality may choose who to hire to provide such representation.⁴⁵ It is not unusual that the municipal attorney represents the chief in prosecuting charges filed against an accused party. However, if the attorney could be called as a witness, the attorney should decline such representation.⁴⁶

A member of the public who files charges may be represented by legal counsel at his or her own cost. The accused is also entitled to representation. Whether the municipality must pay for the accused’s counsel is discussed below.

F. Pay Status

The accused party may be suspended pending the disposition of the charges.⁴⁷ The accused party must be paid during the period of suspension.⁴⁸

39. Wis. Stat. § 62.13(5)(b).

40. The party against whom charges are filed will be referred to as “the accused.”

41. *State ex rel. Hennekens v. City of River Falls Police & Fire Comm’n*, 124 Wis. 2d 413, 422, 369 N.W.2d 670 (1985).

42. Wis. Stat. § 62.13(5)(b).

43. Wis. Stat. § 62.13(5)(d).

44. *Id.*

45. Wis. Stat. § 62.09 (12)(g); League of Wisconsin Municipalities Opinion “Police and Fire Commissions” 110.

46. League of Wisconsin Municipalities Opinion “Police and Fire Commissions” 110.

47. Wis. Stat. § 62.13(5)(a) and (b).

48. Wis. Stat. § 62.13(5)(h).

3. Hearing Process

A. Initial Processing/Preliminary Meeting

By statute, the commission “must set a date for hearing not less than 10 days nor more than 30 days after service of the charges.”⁴⁹ “Service of the charges” refers to the formal service upon the accused. As a practical matter, it is difficult to hold a hearing within this time frame. Setting a date for the hearing depends on the schedules of a number of parties involved, including the commission members, the charging party, the accused, the witnesses, and the attorneys. In addition, a charged party is entitled to due process, which includes being given a reasonable opportunity to develop a defense. Because of this, the parties can agree to waive the statutory time frame and schedule the hearing at a mutually agreeable time. Also, since there is no time frame within which service on the accused must occur, the commission can use this flexibility to undertake preliminary steps with respect to the charge before formally serving the accused and starting the statutory clock.

One way this may be accomplished is for the commission to hold a preliminary meeting before serving the charges on the accused. At this meeting, the parties and commission can address issues such as scheduling, discovery, and pre-hearing motions. In addition, a commission can review the charges to see if they comply with statutory or bylaw requirements and to determine if they invoke the commission’s jurisdiction to discipline the accused. Because the statute does not mention a preliminary meeting, commissions can develop this procedure in their bylaws. Even though the statute does not establish a mandatory time frame for the service of charges on the accused, the commission should process the charges and hold the preliminary meeting as soon as reasonably possible under due process considerations.

The preliminary meeting may include the following steps:

- A copy of the charges should be furnished to the accused along with a clear notice to the accused that this delivery does not constitute formal service of the charges;⁵⁰
- The commission can review the charges to assure that they meet all statutory and bylaw requirements and have been appropriately served on the commission president;
- The commission can review the charges to determine whether, even if true, the discipline would reach the level of suspension, reduction in rank, or termination. The preliminary meeting is not for the purpose of hearing or evaluating evidence. If the commission concludes that, even if the allegations were proven as stated in the charges, discipline would not reach the level of suspension, reduction in rank, or termination, the commission can refer the complaint to the chief for further handling as warranted or, if involving the chief, determine whether lesser discipline is warranted. The commission would then dismiss the charges and notify the parties of the reasons for its actions; and
- If the commission determines that the charges are sufficient in form and nature, it can recess the meeting, arrange to reconvene at a later date for purposes of conducting a formal evidentiary hearing, and make arrangements for service of the charges on the accused.

49. Wis. Stat. § 62.13(5)(d).

50. Providing a copy of the charges could be argued as “serving” them despite notice that such is not the intent.

B. Scheduling Conference

If the commission concludes at its preliminary meeting that the charges are sufficient to warrant an evidentiary hearing, the commission should conduct a scheduling conference, either as part of that meeting or at a different time. Even if the commission does not hold a preliminary meeting, a scheduling conference between the parties and/or their legal counsel is appropriate to establish the procedural timeline leading up to, and the process for, the evidentiary hearing. This will result in a more efficient hearing. The scheduling conference may address the following matters:

- Establishing the date(s) of the evidentiary hearing;
- Setting up deadlines to exchange witness lists and any prior written or recorded statements or reports of witnesses;
- Setting up deadlines to identify and exchange exhibits;
- Setting up any discovery deadline. Prehearing discovery is permitted.⁵¹ The accused may also obtain information through a request for documents under Wisconsin's Public Records Law;
- Establishing the process and deadlines to request the commission to issue subpoenas. The commission president has the power to issue subpoenas to compel the attendance of witnesses;⁵²
- Arranging for the recording of the testimony. The hearing should be transcribed by a court reporter or otherwise recorded to preserve the evidence in case of an appeal to circuit court; and
- Determining if there are any objections to any commission member participating in the hearing, deliberations, or decision and the basis for such objections.

The resolution of these issues should be memorialized in a scheduling order distributed to the parties.

C. Hearing

State statute requires that, prior to being disciplined, a chief or subordinate be provided with an evidentiary hearing to determine whether just cause exists for such disciplinary action.⁵³ Because of this, chiefs and subordinates have procedural due process rights under the Wisconsin and United States constitutions that mandate that certain steps take place in the hearing process.⁵⁴ An accused's due process rights include the rights to reasonable notice of the charges, to be represented by legal counsel, to confront witnesses, to present evidence, and to compel the attendance of witnesses.⁵⁵ The accused cannot be compelled to testify except if granted immunity from criminal prosecution for any testimony provided during the hearing.⁵⁶

The evidentiary hearing is a quasi-judicial proceeding.⁵⁷ It must be held in open session.⁵⁸ The commission's deliberations can be held in closed session and its vote following deliberations may take place in closed session, unless the charged party demands that the vote take place in open session.⁵⁹ A sample notice is found in the Appendix.

A typical hearing format is as follows:

- Reading of the charges by the president;
- Opening statements by the parties, if any;
- Testimony and introduction of evidence by the charging party to substantiate the charges, with cross-examination by the accused;

51. *Conway v. Bd. of Police & Fire Comm'rs of City of Madison*, 2003 WI 53, ¶ 8, 262 Wis. 2d 1, 662 N.W.2d 335 (citing City of Madison PFC Rule 7.20).

52. Wis. Stat. § 62.13(5)(d).

53. Wis. Stat. § 62.13(5)(em).

54. *Conway*, 2003 WI 53, ¶ 40; *Dixon v. City of New Richmond*, 334 F.3d 691 (7th Cir. 2003).

55. *State ex rel. Cortez v. Bd. of Fire & Police Comm'rs*, 49 Wis. 2d 130, 181 N.W.2d 378, (1970).

56. *Herek v. Police & Fire Comm'n*, 226 Wis. 2d 504, 595 N.W.2d 113 (Ct. App. 1999).

57. *Conway*, 2003 WI 53, ¶ 40.

58. Wis. Stat. § 62.13(5)(d).

59. Wis. Stat. § 19.85(1)(a) and (b).

- Testimony and introduction of evidence by the accused with cross-examination by the charging party; and
- Closing arguments.

Testimony at the hearing should be under oath.⁶⁰ The commission may adopt a bylaw specifying what rules of evidence apply. For example, commissions may choose to follow the provisions governing similar administrative proceedings.⁶¹ These provide that the commission is not bound by common law or statutory rules of evidence and that the commission can admit all testimony having reasonable probative value, but shall exclude immaterial, irrelevant, or unduly repetitious testimony or evidence that is inadmissible as privileged under Wisconsin law.⁶² Generally, material issues of fact cannot be based solely upon unsubstantiated and controverted hearsay evidence.⁶³

When the parties have finished providing the commission with evidence, the commission may choose whether to hear closing arguments and/or allow the parties to submit written briefs outlining their factual summary and legal arguments for commission consideration. If the latter, the commission should set up a briefing schedule and a process by which the commission will review the briefs and reconvene to deliberate.

D. Decision

At the conclusion of the evidentiary hearing, the commission should deliberate in closed session. It is critical that commissioners not divulge the contents of the closed session deliberations. In addition, no one other than commission members and the commission's attorney should be present during deliberations at the risk of invalidating the commission decision.⁶⁴ Specifically, courts have held that the presence of a municipally appointed liaison during commission deliberations violates the subordinate's due process rights because it taints the impartiality of the commission by having a municipal representative in the deliberations.⁶⁵

The commission's deliberations should be governed by the statutory standard, which provides that the accused may only be disciplined if the commission finds just cause to sustain the charges.⁶⁶ In its determinations, the commission is required to apply the following just cause standards, to the extent applicable:

1. Whether the subordinate could reasonably be expected to have had knowledge of the probable consequences of the alleged conduct;
2. Whether the rule or order that the subordinate allegedly violated is reasonable;
3. Whether the chief, before filing the charge against the subordinate, made a reasonable effort to discover whether the subordinate did in fact violate a rule or order;
4. Whether the effort described under item 3 was fair and objective;
5. Whether the chief discovered substantial evidence that the subordinate violated the rule or order as described in the charges filed against the subordinate;
6. Whether the chief is applying the rule or order fairly and without discrimination against the subordinate; and
7. Whether the proposed discipline reasonably relates to the seriousness of the alleged violation and to the subordinate's record of service with the chief's department.⁶⁷

Some of these elements are not applicable to situations in which the charging party is someone other than the chief or if the chief is the accused. In those situations, however, the commission should attempt to determine, based upon the evidence, whether the charges were brought based upon an improper motive, whether the

60. Wis. Stat. § 887.01(1).

61. Wis. Stat. § 227.45.

62. Wis. Stat. § 227.45(1).

63. *Folding Furniture Works, Inc. v. Wis. Labor Relations Bd.*, 232 Wis. 170, 285 N.W. 851 (1939); *Gehin v. Wisconsin Group Ins. Bd.*, 2005 WI 16, 278 Wis. 2d 111, 692 N.W.2d 572.

64. *State ex rel. Heil v. Green Bay Police & Fire Comm'n*, 2002 WI App 228, 256 Wis. 2d 1008, 652 N.W.2d 118.

65. *Id.*

66. Wis. Stat. § 62.13(5)(em).

67. *Id.*

administration of the department rules have been fairly applied in similar circumstances, and whether the requested discipline is reasonable in light of past department discipline and the nature of the offense.

The charging party bears the burden of proof on each of the just cause standards by a preponderance of the evidence.⁶⁸ The commission must issue a written determination within three days after the conclusion of the hearing and file it with the commission secretary.⁶⁹ If the deliberations are not completed on the same day as the evidentiary portion of the hearing, the commission should recess the hearing to convene for deliberations at a later date in order to comply with the three-day decision requirement. The commission is required to make factual findings and determinations on each of the seven factors, as applicable. Typically, legal counsel for the commission will draft the decision consistent with the commission's deliberation and vote in order to ensure compliance with statutory requirements and will disseminate the decision and order to the parties.

If the commission finds that the charges are not sustained, the accused must be immediately reinstated and all lost pay, if any, must be restored.⁷⁰ A municipality may, but is not required to, reimburse an exonerated chief or subordinate for costs of defending a disciplinary action brought against the chief or subordinate before the commission.⁷¹

If the commission determines that the charges are sustained, the accused, by order of the commission, may be disciplined as the good of the service may require.⁷² The commission is not required to accept the recommendation of the chief or charging party with respect to the appropriate level of discipline, but may issue its own discipline in the form of suspension, reduction in rank, or termination.

E. The Record

The commission secretary should keep a record of all documents generated as part of the hearing process, including the charges, evidence of service, meeting agendas and minutes, correspondence between the commission and parties, the scheduling order, the hearing transcript or recording, the hearing exhibits, and the written decision and order. The secretary should arrange for the record to be stored at an appropriate, secure municipal location for a period of time consistent with the municipality's record retention schedule.

F. Review

The commission's decision may be appealed to a circuit court either through a statutory process⁷³ or by certiorari action.⁷⁴ An accused may file both a statutory appeal and a petition for a writ of certiorari and the circuit court may address them in any order it deems prudent.⁷⁵ The resolution of issues in the statutory appeal is not binding relative to issues on certiorari review, even though the issues involved in the two methods of review may overlap.⁷⁶

With respect to the statutory appeal, the accused must serve a notice of appeal personally on the commission secretary within 10 days after the commission files its order.⁷⁷ There is no requirement that the notice must first be filed with the court.⁷⁸ The commission must certify the record to the clerk of circuit court within 5 days of service.⁷⁹ Unless otherwise agreed by the parties, the trial is to be scheduled no later than 15 days after an application by either party.⁸⁰ Trial is to the court on the record, but the court may require the return of further evidence by the commission.⁸¹ Typically, "the trial" consists of the court reviewing the record of the commission hearing and briefs submitted by the parties.

68. *Owens v. Bd. of Police & Fire Comm'rs of City of Beloit*, 122 Wis. 2d 449, 455, 362 N.W.2d 171 (Ct. App. 1984).

69. Wis. Stat. § 62.13(5)(f).

70. Wis. Stat. § 62.13(5)(e).

71. Wis. Stat. § 62.09(7)(e); League of Wisconsin Municipalities Opinion "Police and Fire Commissions" 120.

72. Wis. Stat. § 62.13(5).

73. Wis. Stat. § 62.13(5)(i).

74. *Gentilli v. Bd. of Police & Fire Comm'rs*, 2004 WI 60, ¶ 43, 272 Wis. 2d 1, 680 N.W.2d 335.

75. *State ex rel. Heil*, 2002 WI App 228.

76. *Id.*

77. Wis. Stat. § 62.13(5)(i); *Gibson v. City of Racine Police & Fire Comm'n*, 123 Wis. 2d 150, 366 N.W.2d 144 (Ct. App. 1985).

78. *Truttschel v. Martin*, 208 Wis. 2d 361, 560 N.W.2d 315 (Ct. App. 1997).

79. Wis. Stat. § 62.13(5)(i).

80. *Id.*

81. *Id.*

The circuit court's review in a statutory appeal focuses solely on whether there is just cause to sustain the charges against the accused on the evidence in the record established at the commission hearing.⁸² This is a de novo review of the charges without judicial deference to the commission's findings. If the circuit court sustains the charges and the commission's order, the circuit court's decision is final and conclusive.⁸³ If the commission's order is reversed, the accused must be reinstated and is entitled to back pay.⁸⁴

Certiorari review is initiated by the filing of an action in circuit court by the accused and must be commenced within six months of the commission's disciplinary order.⁸⁵ On certiorari, the court determines whether the commission exceeded its jurisdiction; proceeded on a correct legal theory; acted in an arbitrary, oppressive, or unreasonable manner that represented its will and not its judgment; and whether the evidence was such that the commission could reasonably make the determination at issue.⁸⁶ In contrast to the statutory appeal, the circuit court's decision on certiorari review is subject to appellate review.⁸⁷

82. *Id.*

83. *Id.*

84. *Id.*

85. *State ex rel. Enk v. Mentkowski*, 76 Wis. 2d 565, 252 N.W.2d 28 (1977).

86. *Gentilli*, 2004 WI 60, ¶ 19.

87. *Id.* ¶ 14.

Chapter IV

Open Meetings and Public Records

1. Key Provisions in Wisconsin's Open Meetings Law

Governmental bodies, including police and fire commissions, are required to follow the provisions of Wisconsin's open meetings law. The open meetings law is set forth in Wis. Stat. §§ 19.81-19.98 and requires that all meetings of governmental bodies be preceded by public notice and held in open session, unless otherwise expressly provided by law. The policy underlying the law is that the "public is entitled to the fullest and most complete information regarding the affairs of government as is compatible with the conduct of governmental business."¹ To avoid unintended violations, commission members must have a good understanding of the law's requirements. This section provides a brief, general overview of the open meetings law. For a more comprehensive examination of the law's requirements, see the Wisconsin Department of Justice's *Wisconsin Open Meetings Law Compliance Guide* available on the DOJ's website at:

<https://www.doj.state.wi.us/office-open-government-law-and-compliance-guides>.

A. What Is a "Meeting" and When Does One Occur?

A "meeting" is "the convening of members of a governmental body for the purpose of exercising the responsibilities, authority, power, or duties delegated to or vested in the body. If one-half or more of the members of a governmental body are present, the meeting is rebuttably presumed to be for the purpose of exercising the responsibilities, authority, power, or duties delegated to or vested in the body. The term does not include any social or chance gathering or conference which is not intended to avoid [the open meetings law]."²

Commission members should be aware that a "meeting" could occur outside of the typical scheduled commission meeting setting. If a meeting occurs, all applicable meeting law requirements are triggered, including providing public notice prior to the meeting. The rebuttable presumption that a meeting is taking place when one-half of the commission's members are present may give commission members a false sense of security when less than one-half the commission is gathered. However, the courts have interpreted the law to apply when there is less than one-half of the governmental body present. The Wisconsin Supreme Court devised the following two-part test for determining if there is a meeting triggering the open meeting law.³ If both parts of the test are satisfied, there is a "meeting" for purposes of the open meetings law:

1. Purpose – The gathering must be for the purpose of engaging in government business (e.g., discussion, decision, or information gathering).
2. Number – The number of members present must be sufficient to determine the body's course of action regarding the subject matter discussed – usually referred to as a quorum.

The numbers prong of this test can be tricky and it is important to be aware that this number can be either the number necessary to affirmatively pass a proposal or the number necessary to defeat it. For example, if a two-thirds vote of a 5-member commission is required to pass a measure (this is not likely, but is used for purposes of illustrating the concept), that means two people can block passage (since 4 would be required to approve). In that situation, a meeting of those two members to discuss the measure would constitute a meeting in violation of the open meetings law even though the number of members meeting is less than a quorum. Such a situation is known as a "negative quorum." Another problem is what's referred to as a "walking quorum" which is a series of gatherings among separate groups of members of a governmental body, each less than a quorum, that agree, tacitly or explicitly, to act uniformly in sufficient number to reach a quorum.⁴ These "meetings" can take place in a variety of ways – in person, by telephone or e-mail, etc. – and also violate the open meetings law.

1. Wis. Stat. § 19.81(1).

2. Wis. Stat. § 19.82(2).

3. See *State ex rel. Newspapers, Inc. v. Showers*, 135 Wis. 2d 77, 398 N.W.2d 154, 165 (1987).

4. *Showers*, supra.

In certain situations, a commission could be considered to be meeting even when its members are only present to attend the meeting of another governmental body. The Wisconsin Supreme Court has held that when one-half or more of the members of a governmental body attend a meeting of another governmental body to gather information about a subject over which they have decision-making responsibility, such a gathering is also a “meeting” within the meaning of the open meetings law, unless the gathering is social or chance.⁵ As such, notice must be given as required by the open meetings law.

B. Reasonably Accessible, Public Notice and Open/Closed Session

Reasonably Accessible

All police and fire commission meetings must be conducted in open session, subject to limited exceptions.⁶ “Open session” is defined as a meeting held in a place “reasonably accessible to members of the public and open to all citizens at all times.” Interpreting the words “open to all citizens at all times” literally would lead to absurd and unreasonable results.⁷ The language requiring meetings to be held in places “reasonably accessible” to the public suggests that absolute accessibility is not required under the statute. The two phrases, read together, mean that a commission “must meet in a facility which gives reasonable public access, not total access, and that it may not systematically exclude or arbitrarily refuse admittance to any individual.”⁸ Commissions should also be aware that the Americans with Disabilities Act requires that meetings be in places accessible to people with disabilities.

Public Notice

The open meetings law also requires that every meeting of a governmental body be preceded by public notice.⁹ Accordingly, commissions must provide public notice of a meeting at least 24 hours prior to it taking place unless such notice is impossible or impracticable. If there is good cause, shorter notice may be given but in no case may notice be provided less than 2 hours in advance of the meeting.¹⁰ “Good cause” is probably something akin to an emergency and mere inconvenience or lack of planning likely would not constitute good cause. The Wisconsin Department of Justice’s Open Meetings Law Compliance guide (an excellent resource for understanding the law’s requirements) states that when “calculating the twenty-four-hour notice period, Wis. Stat. § 990.001(4)(a) requires that Sundays and legal holidays shall be excluded. Posting notice of a Monday meeting on the preceding Sunday is, therefore, inadequate, but posting such notice on the preceding Saturday would suffice, as long as the posting location is open to the public on Saturdays.”¹¹

The public notice requirement can be met by posting a written notice in one or more locations where the public is likely to see it. Although it is not expressly required by the open meetings law, posting in at least three locations is the recommended practice.¹² Most police and fire commissions can post notices in the same places other municipal bodies use for posting. Additional copies should be posted in each police and fire station. When providing public notice, commissions must also adhere to any other applicable statutory requirements. Newspapers, radio, and TV stations are entitled to file requests with governmental bodies asking that they routinely receive a copy of meeting notices.¹³ Commissions must provide public notice to any news media that have filed written requests for such notice. However, the media requester is not obligated to publish, announce, or publicize a scheduled meeting. Notice of commission meetings must also be provided to the municipality’s official newspaper or, if none exists, to a news medium likely to give notice in the area.¹⁴

5. *State ex rel. Badke v. Greendale Village Bd.*, 173 Wis. 2d 553, 577, 494 N.W.2d 408 (1993).

6. Wis. Stat. § 19.83(1).

7. *Badke*, 173 Wis. 2d at 580.

8. *Badke* at 418.

9. Wis. Stat. § 19.83.

10. Wis. Stat. § 19.84(3).

11. *Wisconsin Open Meetings Law Compliance Guide*, Wisconsin Department of Justice, May 2019, p. 19.

12. 66 Op. Att’y Gen. 93, 95; *Wisconsin Open Meetings Law Compliance Guide*, Wisconsin Department of Justice, May 2019, p.14.

13. Wis. Stat. § 19.84(1)(b).

14. Wis. Stat. § 19.84(1)(b).

A commission cannot provide one notice covering several meetings. The law requires that separate notice of each meeting be provided to appropriate news media and the public.¹⁵ Notice must identify that the police and fire commission will be meeting and include the time, date, place, and subject matter of the meeting, including that intended for consideration at any contemplated closed session. The notice must be in such form as is “reasonably likely to apprise” the public and the news media of the meeting.¹⁶ The standard for notice specificity under the open meetings law is one of reasonableness and strikes the proper balance between the public’s right to information and the government’s need to efficiently conduct its business.¹⁷ It requires a case-specific analysis and whether a notice is sufficiently specific will depend upon what is reasonable under the circumstances. When determining whether notice is specific under the open meetings law, the court will consider: (1) the burden of providing more detailed notice; (2) whether the subject is of particular public interest, and (3) whether it involves non-routine action that the public would be unlikely to anticipate. Whether a meeting notice is reasonable is analyzed from the vantage point of what information was available to the officer noticing the meeting at the time the notice was provided and what it would be reasonable for the officer to know.¹⁸

Commissions should avoid taking up additional matters, not included as separate agenda items, under the generic heading of “other business.” This does not satisfy open meetings law requirements. The Wisconsin Attorney General has stated that “if the meeting notice contains a general subject matter designation and a subject that was not specifically noticed comes up at the meeting, a governmental body should refrain from any information gathering or discussion or from engaging in any action that would deprive the public of information about the conduct of governmental affairs.”¹⁹ Pursuant to the open meetings law, a person, by reading a notice, should be able to discern which matters the governmental body intends to take up at the meeting being noticed.

A sample meeting notice is provided in the Appendix.

Open/Closed Session

Although meetings must generally be held in open session, there are certain statutory exemptions which, when applicable, permit a governmental body to meet in closed session.²⁰ Wisconsin Stat. § 19.85(1) sets forth specific exemptions to the open meetings law that permit governmental bodies to hold a closed session for certain purposes, including:

- Deliberating on a case/matter that was the subject of a judicial or quasi-judicial hearing before that governmental body.²¹
- Considering dismissal, demotion, or discipline of any public employee or the investigation of charges against such person, and the taking of formal action on any such matter; provided that the public employee is given actual notice of any evidentiary hearing which may be held prior to final action being taken and of any meeting at which final action may be taken. The notice shall contain a statement that the person has the right to demand that the evidentiary hearing or meeting be held in open session.²² This exemption does not apply to any such evidentiary hearing or meeting when the employee requests that an open session be held.²³ (This statutory exemption allowing closed session does not relieve a commission from adhering to any other requirements relating to disciplinary proceedings, such as the provision in Wis. Stat. § 62.13(5)(d) requiring a hearing on charges to be public – i.e., held in open session.)

15. Wis. Stat. § 19.84(4).

16. Wis. Stat. § 19.84(2).

17. *State ex rel. Buswell v. Tomah Area School Dist.*, 2007 WI 71, 301 Wis. 2d 178, 732 N.W.2d 804.

18. *Buswell*, ¶ 32.

19. Informal Opinion of Wisconsin Attorney General to Attorney Elizabeth Adelman, I-5-93, dated April 26, 1993 (available at <https://www.doj.state.wi.us/sites/default/files/dls/ompr/I-05-93-adelman.pdf>).

20. Wis. Stat. § 19.85.

21. Wis. Stat. § 19.85(1)(a).

22. *State ex rel. Epping v. City of Neillsville Common Council* implies that notice is not required if there is no evidentiary hearing in closed session and any final action is taken in open session. See *State ex rel. Epping v. City of Neillsville Common Council*, 218 Wis. 2d 516, 523-24, 581 N.W.2d 548.

23. Wis. Stat. § 19.85(1)(b).

- Considering employment, promotion, compensation, or performance evaluation data of any public employee over which the commission has jurisdiction or exercises responsibility.²⁴
- Considering financial, medical, social or personal histories or disciplinary data of specific persons, preliminary consideration of specific personnel problems or the investigation of charges against specific persons, except where Wis. Stat. § 19.85(1)(b) applies which, if discussed in public, would be likely to have a substantial adverse effect upon the reputation of any person referred to in such histories or data, or involved in such problems or investigations.²⁵
- Conferring with the commission's legal counsel when counsel is rendering oral or written advice concerning strategy for litigation in which the commission is or is likely to become involved in.²⁶
- Deliberating or negotiating the purchase of public properties, investing of public funds, or conducting other specified public business, when competitive or bargaining reasons require a closed session.²⁷ This exemption is likely only useful for commissions that exercise optional powers.

Commissions must follow certain procedures when planning a closed session. If a commission contemplates into closed session at the time a meeting notice is prepared, the notice must announce the commission's intent to meet in closed session and cite the specific statutory authority permitting the closed session.²⁸ As mentioned above, public notice pertaining to a closed session should be as specific as possible; merely listing the statutory exemption authorizing the closed session is insufficient. However, a commission need not be so specific as to undermine the purpose of going into closed session. Suppose, for example, that a commission needs to meet in closed session to discuss litigation strategy with the commission's attorney for a pending court case the commission is a party to. If the commission schedules a closed session to discuss the matter, the meeting notice might say: "Motion to go into closed session, pursuant to Wisconsin Statute § 19.85(1)(g), to confer with legal counsel regarding litigation strategy in the matter of Smith v. City of Fairview Police and Fire Commission." By including the general purpose of the closed session (i.e., discussing litigation strategy) the commission provides additional information to the public, but is not so specific as to undermine the purpose for the closed session (e.g., if it were to include the specific strategy decision being made).

The open meetings law requires that governmental bodies begin their meetings in open session. Therefore, a commission should prepare the meeting agenda so that the meeting begins in open session. When the time comes during the meeting to go into closed session, a commission member must make a motion to convene in closed session. Then, the commission president, as presiding officer, shall announce the nature of the business to be considered during the closed session and the specific exemption(s) authorizing the closed session.²⁹ This announcement must be made part of the meeting's record, and no business may be taken up at the closed session other than that which relates to the matters contained in the presiding officer's announcement of the closed session.³⁰ The motion to go into closed session must be carried by a majority vote, with each individual commission member's vote recorded for the record, unless the vote is unanimous.³¹ If a commission did not contemplate the need for closed session prior to the meeting, but decides, during the course of the meeting, that closed session is appropriate, a commission member may make a motion to go into closed session³² and the same procedures should be followed. Spontaneous closed sessions may only occur when the subject matter was identified in the meeting notice. If a commission enters into a closed session that was not contemplated prior to the meeting, it may not return to open session for at least 12 hours because proper notice requirements for the subsequent open session will not be met.³³ Therefore, it would be wise to postpone taking up a matter in an unanticipated closed session until all the other items on the agenda have been addressed – i.e., at the end of the meeting.

24. Wis. Stat. § 19.85(1)(c).

25. Wis. Stat. § 19.85(1)(f).

26. Wis. Stat. § 19.85(1)(g).

27. Wis. Stat. § 19.85(1)(e).

28. Wis. Stat. §§ 19.84(2), 19.85(1).

29. Wis. Stat. § 19.85(1).

30. Wis. Stat. § 19.85(1).

31. Wis. Stat. § 19.85(1).

32. Wis. Stat. § 19.85(1).

33. Wis. Stat. § 19.85(2).

Generally, formal action (i.e., voting) must be taken in open session whenever possible or required. However, a commission can take final action and vote in closed session if the vote is an integral part of the deliberation process.³⁴ Nonetheless, formal action relating to any disciplinary or dismissal decision must always be taken in open session. Commission meeting minutes need not recount what was discussed in a closed session, but any formal action taken by the commission while in closed session, including each motion made, the identity of members offering or seconding a motion, and how each member present voted on the motion, must be recorded in the minutes and may be subject to disclosure under the public records law.³⁵

Attendance at closed sessions is limited to the commission members, necessary staff and other officers, such as the commission's attorney, or persons whose presence is necessary for the business at hand. All police and fire commission members are entitled to be present during closed session regardless of whether they voted for or against the motion to meet in closed session.³⁶ Non-commission members are not entitled to be present during a closed session, unless the commission specifically invites them to be present. A police and fire commission is an independent body created under state law; not a sub-unit of a common council, village or town board. Other officials cannot claim a right to be present when a commission meets in closed session, regardless of the office they hold. Commissions should also be aware that permitting local public officials, or their designees, to participate in proceedings or attend closed sessions is problematic – such actions may taint the commission's proceedings, which are intended to be insulated from local government politics. For example, in *State ex rel. Heil v. Green Bay Police and Fire Commission*,³⁷ the Wisconsin Court of Appeals invalidated the Green Bay police and fire commission's decision to discharge a police officer after an alder, appointed by the mayor as a liaison between the commission and mayor's office, was present and participating throughout the hearing proceedings and also during the commission's deliberations, even though the alder did not vote in the matter.

C. Violations, Enforcement, and Penalties

Violations of the open meetings law may be prosecuted by: (1) the attorney general; (2) the district attorney, upon receipt of a verified complaint made by any person; or (3) the individual who filed the complaint, who may bring an action on behalf of the state if the district attorney fails to commence an action within 20 days after receiving a complaint.³⁸ Commission members who knowingly attend a meeting in violation of the open meetings law or otherwise violate the open meetings law by some act or omission are subject to a forfeiture of between \$25 and \$300.³⁹ These forfeitures are treated as a personal liability and cannot be reimbursed by a municipality.⁴⁰ However, members may seek reimbursement for costs incurred in prosecutions successfully defended.⁴¹ “Knowingly” is not limited to positive knowledge but includes the state of mind of one who acts “with an awareness of the high probability” that a violation is occurring.⁴² Members may protect themselves from liability by voting in favor of a motion to prevent the violation.⁴³

Any action taken at a meeting held in violation of the open meetings law is voidable if a court concludes that the public interest in enforcing the law's provisions is greater than the public interest in sustaining the validity of the action taken.⁴⁴

34. See 67 Op. Att'y Gen. 117 (1978).

35. See Wis. Stat. § 19.88(3).

36. See Wis. Stat. §§ 19.89, 19.96.

37. 2002 WI App 228, 256 Wis. 2d 1008, 652 N.W.2d 118.

38. Wis. Stat. § 19.97.

39. Wis. Stat. § 19.96.

40. Wis. Stat. § 19.96.

41. 66 Op. Att'y Gen. (1977); Wis. Stat. §§ 62.115, 895.35 and 895.46(1)(a).

42. *State v. Swans*, 92 Wis. 2d 310, 284 N.W.2d 655 (1979).

43. Wis. Stat. § 19.96.

44. Wis. Stat. § 19.97(3).

2. Key Provisions in Wisconsin's Public Records Law

Wisconsin's public records law, like the open meetings law, supports and promotes Wisconsin's policy of open government. The public records law, sometimes referred to as the open records law, establishes rules and regulations concerning public inspection and copying of government records. It is set forth in Wis. Stat. §§ 19.31-19.39. The purpose of the public records law is to ensure that citizens have access to "the greatest possible information regarding the affairs of government."⁴⁵ The public records law presumes access will be granted to all public records. The denial of public access is generally contrary to the public interest and access may only be denied in exceptional cases.⁴⁶ Except as otherwise provided by law, any requester has a right to inspect, copy, and receive public records.⁴⁷ This section provides a brief, general overview of the public records law. For a more comprehensive examination of the law's requirements, see the Wisconsin Department of Justice's *Wisconsin Public Records Law Compliance Guide* available on the DOJ's website at <https://www.doj.state.wi.us/office-open-government-law-and-compliance-guides>.

A. What Is an "Authority" and What Is a "Record"?

Authority

The public records law applies to any "authority" that has custody of a record. "Authority" includes any municipal office, body, elected official, board, commission, committee or department created by constitution, law, ordinance, rule, or order.⁴⁸ A police and fire commission is an authority and responding to records requests is a routine part of a commission's duties.⁴⁹

Record

State law defines a "record" as any material on which written, drawn, printed, spoken, visual, or electromagnetic information or electronically generated or stored data is recorded or preserved, regardless of physical form or characteristics, that has been created or is being kept by an authority.⁵⁰ "Record" includes, but is not limited to, handwritten, typed, or printed pages, maps, charts, photographs, films, recordings, tapes, optical discs, and any other medium on which electronically generated or stored data is recorded or preserved.⁵¹ "Record" does not include drafts, notes, preliminary computations, and like materials prepared for the originator's personal use or prepared by the originator in the name of a person for whom the originator works.⁵² This exception is narrowly construed. A "preliminary" version of a document prepared for someone other than the originator's personal use is by definition a record and not a draft, even if it is stamped "draft."⁵³ Also, notes distributed to others for purposes of communicating information or notes retained for the purpose of memorializing a commission's activity are considered records under the law.⁵⁴ Records do not include materials that are purely the custodian's personal property and have no relation to his or her office; materials to which access is limited by copyright, patent, or bequest; and published materials in the possession of an authority other than a public library that are available for sale, or that are available for inspection at a public library.⁵⁵ Commissions should also note that requests for public records are also records, along with the corresponding responses.⁵⁶

45. Wis. Stat. § 19.31.

46. Wis. Stat. § 19.31.

47. Wis. Stat. § 19.35(1)(a).

48. Wis. Stat. § 19.32(1).

49. Wis. Stat. § 19.31.

50. Wis. Stat. § 19.32(2).

51. Wis. Stat. § 19.32(2).

52. Wis. Stat. § 19.21(2).

53. *Fox v. Bock*, 149 Wis. 2d 403, 438 N.W.2d 589 (1989).

54. 77 Op. Att'y Gen. 100 (1988).

55. Wis. Stat. § 19.32(2).

56. *Nichols v. Bennett*, 199 Wis. 2d 268, 274, 544 N.W.2d 428 (1996); *Wisconsin Public Records Law Compliance Guide*, Wisconsin Department of Justice, October 2019, p. 6.

B. Who Is the Legal Custodian of Records?

The commission must designate, in writing, a legal custodian of the commission's records to fulfill its duties under the public records law. In the absence of such a designation, the commission's president is the default custodian of the commission's records.⁵⁷ The commission's records custodian is vested by the authority with full legal power to render decisions and carry out the duties of the authority under the public records law.⁵⁸ The legal custodian of records maintained in a publicly owned or leased building, or the commission appointing the custodian, must also designate a deputy legal custodian to act in the absence of the originally designated custodian.⁵⁹ The commission must provide the name of its legal custodian and a description of the custodian's duties under the public records law to all of the commission's employees, if any, entrusted with records.⁶⁰

C. Notice of Access to Records

A commission must also adopt and display a notice providing certain information to assist the public in gaining access to public records.⁶¹ The notice must describe the commission's organization, the times and locations at which records may be inspected, the identity of the legal custodian, the methods to request access to or copies of records and the costs for such copies. If the commission has regular office hours it must, during those hours, permit access to its records kept at that office, unless otherwise specified by law. If the commission does not have regular office hours, it must permit access upon 48 hours' notice of intent to inspect. Alternatively, the commission may establish a period of at least two consecutive hours per week for record inspection and may require 24-hours' advance written or oral notice of intent to inspect or copy a record within the established access period.⁶² As a practical matter, many municipalities will post the required notice in the municipal clerk's office, which will maintain regular office hours.

D. Who Is a "Requester" and What Are Their Rights?

Under the public records law, a "requester" means any person who requests inspection or copies of a record, except a committed or incarcerated person, unless the person requests inspection or copies of a record that contains specific references to that person or his or her minor children for whom he or she has not been denied physical placement under Ch. 767 of the Wisconsin Statutes, and the record is otherwise accessible to the person by law.⁶³ A person seeking access to a commission's public records has a statutory right to inspect, copy, or receive copies of a record, subject to any other limitations by law.⁶⁴ If a requester appears personally, a commission may either permit the requester to photocopy the record or provide the requester with a photocopy.⁶⁵ A requester who makes a records request by mail is entitled to receive a copy of the record by mail, assuming that it is subject to release and any required prepayment of fees (discussed below) has been made.⁶⁶ A custodian who receives a request by mail may not simply make the record available for inspection and copying at the custodian's office.⁶⁷ Generally, copies of records must be provided in the format requested if available in that format – e.g., a request for email records in electronic form may not be fulfilled by providing the emails in print format.⁶⁸

Requesters have the right to receive from a commission copies and/or transcripts of audio/video tape recordings subject to release and in the commission's custody.⁶⁹ If a record is in a form not readily comprehensible, the requester has a right to information assembled and reduced to written form, unless otherwise provided by law.⁷⁰ If the form of the record does not readily permit copying, the requester still has a right to inspect the record. The commission may permit photographing of such records. If requested, the commission must provide a photograph

57. Wis. Stat. § 19.33(4).

58. Wis. Stat. § 19.33(4).

59. Wis. Stat. § 19.33(6).

60. Wis. Stat. § 19.33(4).

61. Wis. Stat. § 19.34(1).

62. Wis. Stat. § 19.34(2).

63. Wis. Stat. § 19.32(3).

64. Wis. Stat. §§ 19.35(1), 19.36(1).

65. Wis. Stat. § 19.35(1)(b).

66. Wis. Stat. § 19.35(1)(b), (1)(i).

67. *State ex rel. Borzych v. Paluszczuk*, 201 Wis. 2d 523, 549 N.W.2d 253 (Ct. App. 1996).

68. See *Lueders v. Krug*, 2019 WI App 36, 388 Wis. 2d 147, 931 N.W.2d 898.

69. Wis. Stat. § 19.35(1)(c), (d).

70. Wis. Stat. § 19.35(1)(e).

of the record.⁷¹ However, except as necessary to have an existing record made available in a comprehensible form, as provided by Wis. Stat. § 19.35(1)(c), (d) and (e), the public records law does not require an authority to create a new record by extracting information from existing records and compiling the information in a new format.⁷²

E. Form of the Request

A request must reasonably describe the record or information requested. A request must be reasonably limited both as to subject matter and the length of time represented by the record. A request without a reasonable limitation as to the subject matter or length of time represented by the record does not constitute a sufficient request and may be denied on that basis.⁷³

Requests need not be made in writing but the law imposes different requirements on custodians when responding to oral and written requests.⁷⁴ Verbal requests may be denied verbally; however, a requester may, within five business days of an oral denial, demand a written statement of the reasons for denial. In contrast, a written request may only be denied in writing. If a custodian denies a written request, in whole or in part, the custodian must provide the requester with a written statement of the reasons for denial. Every written denial of a request must inform the requester that if the request for the record was made in writing, then the custodian's determination is subject to review upon petition for a writ of mandamus or upon application to the attorney general or a district attorney.⁷⁵

In general, a request may not be refused because the requester declines to identify him/herself or the purpose of their request. However, a requester may be required to show acceptable identification whenever the requested record is kept at a private residence or federal law or regulations so require.⁷⁶ A commission must provide a person who is allowed to inspect a record with facilities comparable to those used by its employees to inspect, copy, and abstract records the requester wishes to inspect.⁷⁷ However, the commission is not required to provide extra equipment or a separate room for public access.

F. Reasonable Restrictions for Inspection

Reasonable restrictions may be imposed on an individual seeking to inspect a public record. A requester must comply with any regulations or restrictions upon access to or use of information that are specifically prescribed by law.⁷⁸ This would likely include complying with restrictions established by ordinance if the restrictions are reasonable and do not unduly burden the requester. A custodian is specifically authorized to impose reasonable restrictions on the manner of access to an original record if the record is irreplaceable or easily damaged.⁷⁹

G. Fees

A commission may impose a fee upon a requester for copying a record, but the fee may not exceed the “actual, necessary, and direct cost” of reproducing, transcribing, or photographing the record.⁸⁰ However, a commission may not charge a requester for the costs of deleting or “redacting” nondisclosable information included in responsive records.⁸¹ Fees for copying may include labor expenses actually, necessarily, and directly incurred in connection with reproduction.⁸² If a record is mailed or shipped, a commission may charge the actual, direct, and necessary costs.⁸³ Additionally, if the cost of locating a record is \$50 or more, a commission may impose a fee for locating the record.⁸⁴ The DOJ *Wisconsin Public Records Law Compliance Guide* provides that “[g]enerally, the rate for an actual, necessary, and direct charge for staff time should be based on the pay rate of the lowest paid employee capable of performing the task.”⁸⁵ The custodian may also require prepayment of fees if the total amount exceeds \$5 or may waive or reduce fees if such waiver or reduction is in the public interest.⁸⁶

71. Wis. Stat. § 19.35(1)(f).

72. Wis. Stat. § 19.35(1)(l).

73. Wis. Stat. § 19.35(1)(h).

74. Wis. Stat. § 19.35(4)(b).

75. Wis. Stat. § 19.35(4)(b).

76. Wis. Stat. § 19.35(1)(i).

77. Wis. Stat. § 19.35(2).

78. Wis. Stat. § 19.35(1)(j).

79. Wis. Stat. § 19.35(1)(k).

80. Wis. Stat. § 19.35(3)(a).

81. *Milwaukee Journal-Sentinel v. City of Milwaukee*, 2012 WI 65, 341 Wis. 2d 607, 815 N.W.2d 367.

82. 72 Op. Att’y Gen. 68 (1983).

83. Wis. Stat. § 19.35(3)(d).

84. Wis. Stat. § 19.35(3)(c).

85. *Wisconsin Public Records Law Compliance Guide*, Wisconsin Department of Justice, October 2019, p. 70.

86. Wis. Stat. § 19.35(3)(e)-(f).

H. Custodian's Time for Response

The commission's custodian, upon receiving a request for a record, must "as soon as practicable and without delay" fill the request or notify the requester of the decision to deny the request in whole or in part. The statutes do not specify a precise time within which the custodian must respond to a records request. However, the Wisconsin Department of Justice has issued guidance on this in its *Wisconsin Public Records Law Compliance Guide*. The Department of Justice's policy is that "ten working days is a reasonable time for responding to a simple request for a limited number of easily identifiable records. For requests that are broader in scope, or that require location, review, or redaction of many documents, a reasonable time frame for responding may be longer."⁸⁷ Thus, a reasonable response time depends on the circumstances and can be affected by various factors, such as needing to consult with an attorney. However, an arbitrary and capricious delay in responding to a records request may expose the custodian to punitive damages and a civil forfeiture of up to \$1,000.⁸⁸

I. Responding to Requests

So, how does a custodian determine the proper response to a public records request? As explained above, Wisconsin's public policy strongly favors access to public records. However, there are certain limited exceptions to the strong presumption favoring access. Generally, public records are open to inspection and copying by the public unless there exists:

1. A state or federal law exempting the record from disclosure;
2. A limitation under common law; or
3. The harm to the public interest from disclosure outweighs the public interest in disclosure (this is commonly referred to as the balancing test).⁸⁹

When a custodian is faced with a records request, the custodian must first determine whether such records exist. If so, the custodian must determine whether access to the records is limited by any of the factors listed above. If a record contains information that is subject to disclosure, and also information that must be withheld, the custodian must delete or black out the information not subject to disclosure before releasing the record.⁹⁰ As mentioned above, the commission must bear the costs of separating information.

In a typical records request, no statutory exemption or common law limitation will apply. Ordinarily, a custodian faced with a records request must engage in the balancing test to determine whether the record should be released or withheld. This requires the custodian to weigh the competing interests involved and determine whether disclosure would result in harm to the public interest that outweighs the recognized public interest in allowing access to public records. In the exceptional case, a custodian/authority may deny a public records request if they determine that the *public* interest in nondisclosure outweighs the *public* interest in disclosure. The interest of the record subject or any other individual is not relevant when applying the balancing test. If the commission's custodian determines that a records request should be denied, the custodian must state the specific policy reasons underlying that determination.⁹¹

It is particularly important for commission members to understand the requirements of Wisconsin's public records law, especially when considering the types of records commissions hold, because certain records or information contained in records may be exempted or prohibited from disclosure or disclosure may be subject to certain requirements and procedures.

87. *Wisconsin Public Records Law Compliance Guide*, Wisconsin Department of Justice, October 2019, p. 15.

88. Wis. Stat. §§ 19.37(3)-(4).

89. *Mayfair Chrysler Plymouth vs. Baldarotta*, 162 Wis. 2d 142, 469 N.W.2d 638, 643 (1991).

90. Wis. Stat. § 19.36(6).

91. *Baldarotta*, 162 Wis. 2d at 157.

J. Requests for Employee-Related Records

A commission's custodian may receive a records request for employee records. Records relating to employees can be placed in three categories: (1) employee-related records that are closed to public access under the public records law, (2) employee-related records that may be released under the balancing test only after a notice of impending release and the right of judicial review has been provided to the employee record subject, and (3) employee-related records that may be released under the balancing test without providing a right of notice or judicial review to the employee record subject.

For records falling into the first category, unless specifically authorized or required by statute, the statutes provide that a custodian shall not allow access to employee personnel records containing the following information,⁹² except to an employee or his/her designee as required by employment regulations statutes or to a recognized or certified collective bargaining representative to the extent required to fulfill a duty to bargain or pursuant to a collective bargaining agreement:

- Information the employer maintains, prepares, or provides concerning an employee's home address, home electronic mail address, home telephone number, or Social Security number – unless the employee authorizes the employer to provide access to the information.
- Information relating to the current investigation of a possible criminal offense or possible misconduct connected with employment by an employee prior to disposition of the investigation.
- Information pertaining to an employee's employment examination, except for the examination score if access to that score is not otherwise prohibited.
- Information relating to one or more specific employees that is used by an authority or by the employer of the employees for staff management planning, including performance evaluations, judgments, or recommendations concerning future salary adjustments or other wage treatments, management bonus plans, promotions, job assignments, letters of reference, or other comments or ratings relating to employees.⁹³

The second category pertains to employee-related records that a custodian may determine should be released under the balancing test, but that (with very limited exceptions) require the custodian to first notify the record subject prior to releasing the record.⁹⁴ Such notice must briefly describe the requested record and include a description of the record subject's rights under Wis. Stat. § 19.356(3)-(4). The Attorney General's office has opined that notice is required under Wis. Stat. § 19.356(2)(a)(1) not only for current employees but also if the record subject is a former employee.⁹⁵ Requests pertaining to the following records trigger a custodian's obligation to provide such notice:

- Records containing information relating to an employee that is created or kept by the authority and that is the result of an investigation into a disciplinary matter involving the employee or possible employment-related violation by the employee of a statute, ordinance, rule, regulation, or policy of the employee's employer.
- Records obtained by the authority through a subpoena or search warrant.
- Records prepared by an employer other than an authority, if that record contains information relating to an employee of that employer, unless the employee authorizes the authority to provide access to that information.

92. See section 2.N. on page 54.

93. Wis. Stat. § 19.36(10).

94. Wis. Stat. § 19.356(2).

95. Opinion of Wis. Att'y Gen. to Grant Langley, Milwaukee City Attorney, OAG-02-18 (Feb. 23, 2018).

Notice is not required when access is provided to the employee who is the subject of the record, or to his or her representative or collective bargaining representative.⁹⁶ Similarly, notice is not required when an authority releases a record produced for equal rights, discrimination, or fair employment law compliance purposes.⁹⁷

Within three days of deciding to release a record specified above, and before allowing access to that record, a custodian must notify the record subject by certified mail, or personal service upon the record subject, of the custodian's decision to release the record.⁹⁸ Saturday, Sunday, and legal holidays are excluded when computing the various time periods for performing an act.⁹⁹ The notice must briefly describe the requested record and explain the record subject's rights to file a notice of intent to appeal, and also to seek a court order restraining the custodian from providing access. Within five days after receiving notice of the custodian's decision to release the record, the record subject may notify the authority in writing that he or she intends to seek a court order restraining the authority from providing access to the requested record. Within 10 days after receiving the notice from the custodian, the record subject may commence an action seeking to restrain the custodian from releasing the record.¹⁰⁰ In any such action, the authority is named as the defendant although the requester may intervene as a matter of right. If the requester does not intervene in the action, the authority must notify the requester of the proceedings' results.

An authority may not provide access to a requested record within 12 days of sending a notice pertaining to that record to the record subject.¹⁰¹ If the record subject commences an action, the authority may not provide access to the record during the pendency of the action or any subsequent appeal, or during an unexpired time period for appeal or petition for review of a decision adverse to the record subject.¹⁰² The law also provides for expedited review by the court, both at the circuit court and court of appeals levels. The circuit court must issue a decision within 10 days after the filing of the summons and complaint and proof of service upon the defendant, unless a party demonstrates cause for extension. In any event, the court shall issue a decision within 30 days after those filings are complete.

Requests for records falling into the third category (employee-related records that may be released under the balancing test without providing a right of notice or judicial review to the employee record subject) should be evaluated using the normal procedures for responding to public records request – i.e., by applying the balancing test.

It's worth noting that there are also circumstances when an employee does not have the right to access his or her own employment record. An employee's right to inspect his or her personnel records does not apply to:

- Records relating to the investigation of possible criminal offenses committed by that employee;
- Letters of reference for that employee;
- Any portion of a test document, except that the employee may see a cumulative total test score for either a section of the test document or for the entire test document;
- Materials used by the employer for staff management planning, including judgments or recommendations concerning future salary increases and other wage treatments, management bonus plans, promotions and job assignments, or other comments or ratings used for the employer's planning purposes;
- Information of a personal nature about a person other than the employee if disclosure of the information would constitute a clearly unwarranted invasion of the other person's privacy;

96. Wis. Stat. § 19.356(2)(b).

97. Wis. Stat. § 19.356(2)(c).

98. Wis. Stat. § 19.356(2)(a).

99. Wis. Stat. § 19.345.

100. Wis. Stat. § 19.356(4) gives a subject ten days to commence a suit. However, since a suit is commenced as of the date of filing so long as service is timely made (Wis. Stat. § 801.02(1)), and a person has ninety days after filing to serve the suit, the actual time limit for bringing the action could potentially be much longer.

101. Wis. Stat. § 19.356(5).

102. Wis. Stat. § 19.356(5).

- An employer who does not maintain any personnel records; and
- Records relevant to any other pending claim between the employer and the employee which may be discovered in a judicial proceeding.¹⁰³

K. Requests for Information Pertaining to Local Public Officials

A commission's custodian may also receive records requests for records pertaining to local public officials. First, it is important to note that in the context of public records, "local public office" includes any appointive office or position of a local governmental unit in which an individual serves as the head of a department, agency, or division of the local government unit.¹⁰⁴ Accordingly, police and fire chiefs are local public officials under the public records law. Individuals holding local public office are not entitled to de novo judicial review prior to release of records as with the employee-related records specified above. However, if a commission decides under Wis. Stat. § 19.35 to permit access to a record containing information related to a record subject who is an officer or employee of the authority holding local public office, the commission must, before permitting access and within 3 days after deciding to permit access, serve written notice of that decision on the record subject, either by certified mail or by personally serving the notice on the record subject.¹⁰⁵ The local public official then has five days after receipt of the notice to augment the record to be released with written comments and documentation. The Attorney General has opined that only those currently holding local public office are entitled to notice and the opportunity to augment the record under § 19.356(9).¹⁰⁶ Records pertaining to local public officials that contain a home address, home e-mail address, home phone number, or Social Security number cannot be released unless specifically authorized by statute or authorized by the record subject.¹⁰⁷ An exception to this allows the release of the home address of a person holding an elected public office or an individual subject to a residency requirement.

L. Requests Pertaining to Commission Proceedings

Commissions may receive requests for records of the commission's own proceedings. Such records kept by the commission are subject to disclosure under the public records law unless an exemption applies or disclosure is prohibited. Commissions may also receive records requests pertaining to records that are related to a matter taken up by a commission in closed session. Records pertaining to closed sessions *are not automatically exempt* from disclosure under the public records law – the custodian must apply the balancing test. In performing the balancing test, exemptions to the open meetings law under Wis. Stat. § 19.85(1) are indicative of public policy, although they are not dispositive and do not relieve the custodian of the duty to engage in the balancing test and state specific public policy reasons for nondisclosure. Merely citing the applicable open meetings law exemption statute does not meet the specificity requirement.¹⁰⁸ A custodian relying on an open meetings exemption to deny access to a record must articulate specific public policy reasons justifying the restriction on access.¹⁰⁹

M. Requests Pertaining to Applicants for Employment

A commission is prohibited from providing access to any record that reveals the identity of an applicant for a position with the municipality if the applicant has indicated in writing that the applicant does not want his or her identity revealed.¹¹⁰ However, a commission must provide public access to any record that reveals the identity of an applicant who is selected as a "final candidate" for any "local public office." "Final candidate" means "each applicant for a position who is seriously considered for appointment or whose name is certified for appointment and whose name is submitted for final consideration to the commission for appointment" to local public office.¹¹¹ Again, "local public office" is defined to include "any appointive office or position of a local government unit in which an individual serves as the head of a department, agency, or division of the local government unit, but does

103. Wis. Stat. § 103.13(6).

104. Wis. Stat. § 19.32(1dm).

105. Wis. Stat. § 19.356(9).

106. Opinion of Wis. Att'y Gen. to Grant Langley, Milwaukee City Attorney, OAG-02-18 (Feb. 23, 2018).

107. Wis. Stat. § 19.36(11). See section 2.N. on page 54.

108. *Oshkosh Northwestern Co. v. Oshkosh Library Board*, 125 Wis. 2d 480, 373 N.W.2d 459 (Ct. App. 1985).

109. Wis. Stat. § 19.35(1)(a).

110. Wis. Stat. § 19.36(6).

111. Wis. Stat. § 19.36(7)(a).

not include any office or position filled by a municipal employee,” as defined in Wis. Stat. § 111.70(1)(i). Thus, in the context of a police and fire commission, “local public office” would include the police chief and fire chief positions.

N. Separation of Information

If a record contains both information subject to disclosure and information not subject to disclosure, an authority must provide the information subject to disclosure and redact the information not subject to disclosure before release.¹¹²

O. Challenge to Accuracy of Records Containing Personally Identifiable Information

Commissions should also be aware that an individual may challenge the accuracy of a record containing personally identifiable information pertaining to the individual that is maintained by the commission if the individual is authorized to inspect the record under Wis. Stat. § 19.35(1)(a) or (am) and the individual notifies the commission, in writing, of the challenge. A commission must, after receiving such notice, either concur with the challenge and make the correction or deny the challenge. If the challenge is denied, the commission must notify the individual, or person authorized by the individual, of the denial and allow the individual or authorized person to file a concise statement setting forth the reasons for the individual’s disagreement with the disputed portion of the record.¹¹³

P. Enforcement and Penalties

The public records law provides for forfeitures and court orders as tools of enforcement.¹¹⁴ If a commission withholds access to part or all of a record or delays granting access to a record, a person who has made a written request for the record may bring an action for a writ of mandamus asking a court to order release of the record. The requester may also request the district attorney of the county where the record is found or the attorney general to bring an action for a writ of mandamus.¹¹⁵ If the requester brings the action and “prevails in whole or in substantial part,” the court may award reasonable attorney’s fees, actual costs, and damages of not less than \$100.¹¹⁶ Costs and fees must be paid by the commission or the unit of government of which it is a part, or by the unit of government by which the commission’s custodian under Wis. Stat. § 19.33 is employed and may not become a personal liability of any public official.¹¹⁷ If the court finds that a commission or its custodian has arbitrarily or capriciously denied or delayed response to a requester or charged excessive fees, the court may award the requester punitive damages and/or impose a forfeiture of not more than \$1,000.¹¹⁸

Q. Records Retention

Commissions and their custodians should also understand the legal requirements regarding records retention. Wisconsin law requires public records to be retained for certain minimum periods of time and commissions and their custodians must follow specific procedures before destroying records. The period of time any public record is kept before destruction is as prescribed by ordinance unless a specific period of time is provided by statute. The period of time prescribed in the ordinance may not be less than seven years for most records unless the Wisconsin Public Records Board (“PRB”) has approved a shorter period under Wis. Stat. § 16.61(3)(e).¹¹⁹ Recommended retention schedules, outlining retention periods approved by the PRB, may be found in the Wisconsin Municipal Records Schedule, which provides an overview of records management practices and recommendations for the retention and disposition of records. However, municipalities must adopt the Municipal Records Schedule for it to apply to the municipality. An electronic version of the manual is available online at: <https://publicrecordsboard.wi.gov/Pages/GRS/LocalUnit.aspx>. Regardless of any applicable retention period, records that are the subject of a pending public records request may not be destroyed until after the request is granted or until at least 60 days after the date that the request is denied or, if the requester is a committed or incarcerated person, until at least 90

112. Wis. Stat. § 19.36(6).

113. Wis. Stat. § 19.70.

114. Wis. Stat. § 19.37.

115. Wis. Stat. § 19.37.

116. Wis. Stat. § 19.37(2)(a).

117. Wis. Stat. § 19.37(2)(a).

118. Wis. Stat. § 19.37(3)-(4).

119. Wis. Stat. § 19.21(4)(b).

days after the date that the request is denied.¹²⁰ If a commission receives written notice that an action relating to a record has been commenced under Wis. Stat. § 19.37, the record may not be destroyed until after the order of the court in relation to such record is issued and the deadline for appealing that order has passed, or, if appealed, until after the order of the court hearing the appeal is issued. If the court orders the production of any record and the order is not appealed, the record may not be destroyed until after the request for inspection or copying is granted.

¹²⁰ Wis. Stat. § 19.35(5).

This page intentionally left blank.

Chapter V

Municipal and Public Official Liability¹

1. This chapter was written by Attorney Remzy D. Bitar of Municipal Law & Litigation Group, S.C.

1. Municipal Liability Generally

A. Municipal and Personal Liability under Wisconsin Law

Persons or organizations that feel they have suffered an injury as a result of the actions of a municipal official or employee may file a lawsuit against the individual and the municipality to recover damages. In general, municipal liability in the State of Wisconsin is controlled by Wis. Stat. §§ 893.80 and 895.46. These sections, along with published court decisions interpreting these statutes, define the liability of municipalities, their agencies, and their officials and employees in state tort actions as well as matters of indemnification for judgments entered against them. As a general rule, municipal officials and employees need fear no personal loss or liability for the honest performance of their duties and exercise of powers granted by law.

Municipal employees and officials are often shielded by statute and judicially imposed immunities from liability for injuries to others arising out of acts performed within the scope of their public employment. The public policy behind this practice is to encourage service to municipal government and reduce fear of personal liability stemming from acts taken in good faith while in an official government position.

B. Indemnification

State law requires a municipality to pay any civil judgment for damages and costs entered against a municipal official or employee for acts performed within the scope of their employment, in excess of any insurance applicable to the official or employee. Under Wis. Stat. § 895.46, municipal officials and employees will be indemnified by the municipality for negligent acts taken within the “scope of their employment.” This requirement has been construed to mean that the official or employee’s action must have been taken, in some measure, to serve the municipal employer.² Once the determination is made that the official or employee was acting in the scope of employment, the indemnification requirement may apply even if the act taken is outside what the employer may have desired so long as it furthers the objectives of the employer.³ Indemnification may extend to cases where punitive damages are assessed; where the employee acts intentionally or even criminally and even where the employee misuses or exceeds his/her authority; and to cases involving defense of open meetings violations, with the exception that public officials cannot be reimbursed for the forfeitures they are ordered to pay for violating the open meetings law.⁴

The indemnification statute applies to most foreseeable actions taken by municipal officials and employees in the scope of their employment, including operating motor vehicles or machinery, employment and civil rights claims, environmental lawsuits and property damage claims. However, failure of an employee or officer to give notice to the municipality of an action commenced against them as soon as reasonably possible can be a bar to recovery of the costs of defending the action by the employee or officer.

C. Federal Law

The Civil Rights Acts of 1870 and 1871, codified as 42 U.S.C. §§ 1981, 1982, 1983, 1985, and 1986, were enacted to allow citizens to seek redress for deprivations of their constitutional rights and, consequently, to allow for money damages for civil rights violations.

Section 1981 provides that “all persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, as is enjoyed by white citizens . . .” and defines making and enforcing of contracts as “the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.” 42 U.S.C. § 1981. Most commonly, litigants invoke § 1981 to assert their rights to be free from discrimination while making and enforcing employment contracts. Section 1981 applies to allegations of discrimination based on race but not national origin.⁵ As under § 1983, there is no liability under the doctrine of respondeat superior under § 1981.⁶

2. *Olson v. Connerly*, 156 Wis. 2d 488, 457 N.W.2d 479 (1990).

3. *Graham v. Sauk Prairie Police Comm.*, 915 F.2d 1085 (7th Cir. 1990).

4. *Javier v. City of Milwaukee*, 670 F.3d 823, 830 (7th Cir. 2012); 77 Op. Att’y Gen. 177.

5. *Von Zuckerstein v. Argonne Nat’l Lab.*, 984 F.2d 1467 (7th Cir. 1993).

6. *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 735-36 (1989).

A plaintiff can establish claims by either direct evidence of discrimination or an indirect method of proof using a variety of circumstantial evidence.⁷

Section 1982 provides that “[a]ll citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.” The only difference between §§ 1981 and 1982 is that one deals with contracts and the other with property.⁸ Section 1982 has been broadly construed to include post-acquisition discrimination.⁹

Section 1985 prohibits conspiracies between a private actor and state actors to deprive a person or a class of persons of their constitutional rights. Section 1985(3) requires allegations of racial or some other type of invidious, class-based discrimination in violation of the equal protection of the laws or equal privileges or immunities under the law. In order to state a claim under § 1985(3), a plaintiff must allege:

1. there was a conspiracy;
2. the conspiracy was for the purpose of violating plaintiff’s constitutional rights;
3. an act occurred in furtherance of the conspiracy; and
4. the plaintiff was injured or deprived of his rights.

The function of § 1985(3) is to permit recovery from a private actor who has conspired with state actors.¹⁰ Pleading such a claim against defendants where all defendants are state actors who are also being sued under § 1983 is “superfluous.”¹¹ Section 1986 creates a cause of action for failure to prevent or aid in preventing a violation of § 1985. Thus, no claim may lie under § 1986 unless a valid claim setting forth a conspiracy to deprive a person of his civil rights is established under § 1985.¹²

Most claims arise under 42 U. S. C. § 1983, which allows a municipality or municipal official to be sued for actions that violate an individual’s rights under the United States Constitution. An action taken under color of state or local law that deprives a person or entity of a constitutional right, may give rise to an action under federal law. Individuals, officers, and employees may be sued under this section.¹³ Section 1983 “is not itself a source of substantive rights, but a method for vindicating federal rights elsewhere conferred by those parts of the United States Constitution and federal statutes that it describes.”¹⁴

To state a claim under § 1983, a plaintiff must allege that: (1) the defendant deprived the plaintiff of a right secured by the Constitution and laws of the United States, and (2) the defendant acted under color of state law.¹⁵ In addition, there must be an actual, compensable injury and a showing that the unconstitutional action was the “cause in fact” of the injury.¹⁶ A deliberately indifferent policy or custom is deemed to be the moving force of a constitutional injury if the conduct is a substantial factor in bringing about the harm. The policy or custom must be “closely related to the ultimate injury,” and the court should inquire whether “the injury [would] have been avoided” in its absence.¹⁷

Municipalities and other political subdivisions of the state, as well as their agencies, officials, and employees, can be sued directly under this section.¹⁸ However, there is no respondeat superior or vicarious liability for civil rights claims, unlike negligence claims.

7. *Egonmwan v. Cook County Sheriff's Dept.*, 602 F.3d 845, 849-50 (7th Cir. 2010).

8. *Lubavitch-Chabad of Illinois, Inc. v. Nw. Univ.*, 772 F.3d 443, 447 (7th Cir. 2014).

9. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968) (finding that the purpose of sec. 1982 included securing for African-Americans “the privilege to go and come [from and to their property] when they please.”).

10. See *United Brotherhood of Carpenters & Joiners of America, Local 610 v. Scott*, 463 U.S. 825 (1983); *Fairley v. Andrews*, 578 F.3d 518, 526 (7th Cir. 2009).

11. *Id.*

12. See *Smith v. Gomez*, 550 F.3d 613, 617 (7th Cir. 2008); *Bell v. City of Milwaukee*, 746 F.2d 1205, 1233 (7th Cir. 1984).

13. *Monroe v. Pape*, 365 U.S. 167 (1961).

14. *Baker v. McCollan*, 443 U.S. 137 (1979).

15. *Reed v. City of Chicago*, 77 F.3d 1049 (7th Cir. 1996).

16. *Carrey v. Piphus*, 435 U.S. 247 (1978).

17. *City of Canton v. Harris*, 489 U.S. 379 (1989).

18. *Monell v. Department of Social Services*, 436 U.S. 658 (1978).

A municipality can only be held liable if an “official municipal policy” caused the complained-of harm.¹⁹ A plaintiff must prove (1) the act was conducted pursuant to a written policy that caused the deprivation, (2) the conduct was one of a series of incidents amounting to an unconstitutional practice so permanent, well-settled, and known as to constitute a custom or usage, or (3) the conduct was caused by a decision of a policymaker with final policymaking authority.

Supervisors may also be sued; for such claims, supervisors must have personally participated in the violation for liability to accrue.²⁰ Yet, a supervisor may still be personally liable for the acts of his subordinates if he “approves of the conduct and the basis for it.”²¹ “[S]upervisors must know about the conduct and facilitate it, approve it, condone it, or turn a blind eye for fear of what they might see. They must in other words act either knowingly or with deliberate, reckless indifference.”²²

Suing municipal officers or employees in their “official capacity” is the same thing as suing the municipality itself. In order for there to be liability in an “official capacity” claim, the same elements of proof as with suing a municipality must be shown. Officers and employees can also be sued in their “individual capacity.” An “individual capacity” action is one against the official or employee personally, so that, if the suit is successful, the official is liable personally for damages (although indemnification by the local government is likely). Unlike an “official capacity” lawsuit, an “individual capacity” lawsuit may be defended on the basis of absolute or qualified immunity. In these cases of an “individual capacity” claim against an individual, the municipality may indemnify the employee for their actions.

A claimant may also allege that deliberate indifference in the training or supervision of the employee or employees may give rise to a claim under § 1983.²³ A municipality may rebut this assertion by showing that training for employees is done and that it is done in a manner consistent with current applicable law or standards.²⁴ However, if it is shown that there have been past acts that demonstrate a consistent failure to prevent unconstitutional conduct of the employees, liability can be found.²⁵ The alleged failure to train must amount to “deliberate indifference to the rights of persons with whom the [employees] come into contact.”²⁶ This is “a stringent standard of fault,” which “require[es] proof that a municipal actor disregarded a known or obvious consequence of his action.”²⁷

In contrast to state law claims, suits brought under federal civil rights law may entitle a claimant to attorney fees in addition to damages and equitable remedies.²⁸

19. *Monell v. New York City Dept. of Soc. Servs.*, 436 U.S. 658, 692 (1978).

20. *Chavez v. Illinois State Police*, 251 F.3d 612 (7th Cir. 2001).

21. *Id.*

22. *Id.*

23. *City of Canton v. Harris*, 489 U.S. 379 (1989).

24. *Ross v. Austin*, 343 F.3d 915 (7th Cir. 2003).

25. *Bd. of Com. v. Brown*, 520 U.S. 397 (1997).

26. *City of Canton v. Harris*, 489 U.S. 378, 388 (1989).

27. *Bryan Cty. v. Brown*, 520 U.S. 397, 410 (1997).

28. 42 U.S.C. § 1988.

2. Notice of Injury and Notice of Claim

Under Wis. Stat. § 893.80, persons seeking to make a state law claim against a municipality or its officers or employees must follow certain procedural requirements. State law imposes a mandatory two-step notice procedure. Failing to comply with the statute can result in a bar to a claim against the municipality or its officers or employees. The first requirement is that all claimants file a timely notice of injury and events giving rise to the claim. The second requirement is that all claimants submit a written notice of claim, itemizing all damages allegedly resulting from the municipal entity's actions.

These two notice requirements give the governmental entity a chance to investigate potential claims, and to compromise and budget for settlement.²⁹ When evaluating whether a particular notice fulfilled those purposes, courts have recognized “the notice of claim provisions may be satisfied with substantial, rather than strict, compliance.”³⁰

The notice requirements apply to many kinds of claims, unless courts have recognized special exceptions.³¹ The notice requirements of § 893.80 are not applicable in federal civil rights actions.³²

A. Notice of Injury and Circumstances

Under § 893.80(1)(a), municipalities must be provided notice of the circumstances of the claim. This “notice of injury” must be received by the municipality within 120 days of the incident giving rise to the claim. There are two ways of fulfilling this first requirement. First, a claimant can serve upon the municipality a written notice of injury within 120 days of the incident.³³ The notice must be a simple statement of the events giving rise to a claim, which needs to be investigated.

The second manner in which the notice of injury requirement may be fulfilled is when the claimant can prove that the municipal government had actual notice of the events giving rise to the claim and the failure of the claimant to provide written notice within 120 days was not prejudicial to the municipal entity.³⁴ Knowledge that an event has occurred does not constitute knowledge that a claim may be made. To constitute actual notice of a claim, the government entity must not only have knowledge of the event, but also the identity and type of damage alleged to have been suffered by a potential claimant.³⁵ Municipalities should investigate an incident with the potential for personal injury, property damage or other types of damages.

B. Written Claim

The second requirement under Wis. Stat. § 893.80 is a written claim. Under § 893.80(1)(b), an itemized claim of damages must be presented, considered, and disallowed by the municipality prior to the claimant filing a lawsuit. The written claim is not subject to any filing deadline.³⁶ It must:

1. state a claimant's address,
2. include an itemized statement of the relief sought,
3. be presented to the appropriate clerk, and
4. be disallowed by the governmental entity.³⁷

29. *Bostco LLC v. Milwaukee Metro. Sewerage Dist.*, 2013 WI 78, ¶ 88, 350 Wis. 2d 554, 835 N.W.2d 160.

30. *Id.*

31. *E-Z Roll Off, LLC v. Cty. of Oneida*, 2011 WI 71, ¶ 23, 335 Wis. 2d 720, 800 N.W.2d 421 (discussing cases recognizing exceptions and summarizing the following considerations when determining whether to exempt a specific statute from the notice of claim requirements: (1) whether there is a specific statutory scheme for which the plaintiff seeks exemption; (2) whether enforcement of the notice of claim requirements found in Wis. Stat. § 893.80 would hinder a legislative preference for a prompt resolution of the type of claim under consideration; and (3) whether the purposes for which § 893.80 was enacted would be furthered by requiring that a notice of claim be filed).

32. *Felder v. Casey*, 487 U.S. 131, 138 (1988).

33. *DNR v. City of Waukesha*, 184 Wis. 2d 178, 515 N.W.2d 888 (1994).

34. *Vanstone v. Town of Delafield*, 191 Wis. 2d 587, 530 N.W.2d 16 (Ct. App. 1995).

35. See *Markweise v. Peck Foods Corp.*, 205 Wis. 2d 208, 220, 556 N.W.2d 326 (Ct. App. 1996).

36. *Vanstone v. Town of Delafield*, 191 Wis. 2d 586, 593, 530 N.W.2d 16 (Ct. App. 1995).

37. Wis. Stat. § 893.80(1)(b).

The claim must set forth the specific dollar amount of damages claimed.³⁸ Actual notice may satisfy the notice of injury provisions of Wis. Stat. § 893.80(1)(a), but does not satisfy the written claim provisions of § 893.80(1)(b).³⁹

In order for the claim to proceed, the municipality must disallow the written notice of claim. There are two ways this can be accomplished: actual disallowance or statutory disallowance. Actual disallowance, as the name implies, is a formal written denial of the claim served on the claimant by registered or certified mail within 120 days after the claim has been presented. If a claimant is served with a disallowance by a municipality, the claimant is required to bring a lawsuit within 6 months of service of that disallowance, or the claim is barred.⁴⁰ Strict compliance is required; for example, service on the claimant's attorney may be insufficient.⁴¹

Statutory disallowance takes place when a claim is presented to a municipality and the municipality does not respond within 120 days. If the municipality fails to act within 120 days, the claim is deemed disallowed and the claimant may file a lawsuit against the municipality.⁴² Statutory disallowance differs from actual disallowance in that claimants who do not receive a written disallowance are not bound by the six-month deadline for commencing an action, and may bring suit anytime within the applicable statute of limitations.⁴³

Municipalities should establish a centralized procedure for reviewing, considering, and disallowing (if appropriate) any notice of claim received by the municipality within the requisite 120-day period in order to take advantage of the six-month deadline for commencing a lawsuit against the municipality.

3. Liability Limits

State law limits the amount a person can recover in a lawsuit filed against a municipality and its officers and employees to \$50,000 per cause of action (\$25,000 for volunteer fire departments).⁴⁴ It should be emphasized that this "damage cap" applies to each cause of action by a single plaintiff arising out of a single wrongful or negligent act.⁴⁵ For example, if three persons claim injuries against a city official, all three persons may recover up to the statutory limit. Also, any derivative claims (independent claims of a third person deriving from the injury, such as loss of consortium claims) may have separate liability caps.⁴⁶

A higher liability limit applies when a motor vehicle owned or leased by a municipality is involved in an accident. A plaintiff may recover up to \$250,000 in an action for damages arising from the negligent operation of municipal motor vehicles.⁴⁷

These statutory liability limits do not apply to civil rights claims under 42 U.S.C. § 1983.

38. *DNR v. City of Waukesha*, 184 Wis. 2d 178, 515 N.W.2d 888 (1994).

39. *Gillen v. City of Neenah*, 219 Wis. 2d 806, 580 N.W.2d 628 (1998).

40. *Pool v. City of Sheboygan*, 2007 WI 38, 300 Wis. 2d 74, 729 N.W.2d 415.

41. *Id.*

42. *Blackbourn v. Onalaska School Dist.*, 174 Wis. 2d. 496, 500, 497 N.W. 2d. 460 (Ct. App. 1993).

43. *Coleman v. City of Milwaukee*, 107 Wis. 2d. 528, 531, 319 N.W.2d. 863 (1982).

44. Wis. Stat. § 893.80(3).

45. *Gonzalez v. City of Franklin*, 137 Wis. 2d 109, 403 N.W.2d 747 (1987).

46. *Boles v. Milwaukee Co.*, 150 Wis. 2d 801, 443 N.W.2d. 679 (Ct. App. 1988) (spouse's claim for loss of consortium in an accident that lead to personal injuries); *Wood v. Milin*, 134 Wis. 2d 279, 397 N.W.2d 479 (1986) (husband and wife, as owners of damaged property, were each permitted to recover the maximum amount where each had a distinct interest in the property).

47. Wis. Stat. § 345.05.

4. Immunities

Under Wis. Stat. § 893.80, municipalities and their officers and employees are granted broad immunity from liability for injuries resulting from acts performed within the scope of their official duties.⁴⁸

Municipal officers and employees may be immune from suit when performing “discretionary” duties. A discretionary duty is one that calls for reasoned opinion and judgment on the part of an officer or employee.⁴⁹ A discretionary act is one that involves choice or judgment.⁵⁰ Stated differently, a discretionary act involves the “exercise of judgment in the application of a rule to specific facts.”⁵¹ The statute’s immunity against liability for legislative, quasi-legislative, judicial, and quasi-judicial acts, has been “collectively interpreted to include any act that involves the exercise of discretion and judgment.”⁵² “The immunity defense assumes negligence, focusing instead on whether the [government] action (or inaction) upon which liability is premised is entitled to immunity under the statute, and if so, whether one of the judicially-created exceptions to immunity applies.”⁵³

Many actions taken by municipal officers and employees are discretionary in nature, calling for some subjective evaluation of the situation. For example, law enforcement generally requires persons to make moment-to-moment decisions in crisis management that are entitled to discretionary immunity.⁵⁴ Actions taken as part of the general enforcement of a municipal code, including the issuance of permits may be entitled to immunity.⁵⁵ “Decisions concerning the adoption, design, and implementation of a public works system are discretionary, legislative decisions for which a municipality enjoys immunity.”⁵⁶ A decision to remove stop logs from dam ditches was a discretionary policy decision as it involved balancing of risks and advantages of how to address erosion problems.⁵⁷ Decisions have been deemed discretionary even where they lead to mistaken advice, injuries caused by unsafe conditions, or involve highly regulated areas so long as the statutory or regulatory schemes allow some degree of discretion.⁵⁸

In *Showers Appraisals, LLC v. Musson Bros.*, the Wisconsin Supreme Court stated “[W]here a third party’s claim against a government contractor is based on the allegation that the contractor negligently performed its work under a contract with a governmental entity,” in order to assert governmental immunity, “the ... contractor must prove both that the contractor meets the definition of ‘agent’ under Wis. Stat. § 893.80(4), as set forth in [*Estate of Lyons v. CNA Ins. Cos.*],⁵⁹ and that the contractor’s act is one for which immunity is available under § 893.80(4).”⁶⁰ The *Lyons* test examines whether “(1) the governmental authority approved reasonably precise specifications; (2) the contractor’s actions conformed to those specifications; and (3) the contractor warned the supervising governmental authority about the possible dangers associated with those specifications that were known to the contractor but not to the governmental officials.”⁶¹ As the *Showers* court explained, the first two prongs of the *Lyons* test, by asking whether the agent is merely carrying out the reasonably precise specifications of the governmental authority, ensure that the discretionary act – the legislative, quasi-legislative, judicial, or quasi-judicial decision – is made by the governmental entity, not by the contractor itself.⁶²

48. *Umansky v. ABC Ins. Co.*, 2009 WI 82, 319 Wis. 2d 622, 769 N.W.2d 1.

49. *Pries v. McMillon*, 2010 WI 63, 784 N.W.2d 648.

50. See *Kimps v. Hill*, 200 Wis. 2d 1, 546 N.W.2d 151 (1996).

51. *Willow Creek Ranch LLC v. Town of Shelby*, 235 Wis. 2d 409, 611 N.W.2d 693 (2000).

52. *Lodl v. Progressive Northern Ins. Co.*, 2002 WI 71, 253 Wis. 2d 323, 646 N.W.2d 314.

53. *Id.*, ¶ 17.

54. *Barillari v. City of Milwaukee*, 194 Wis. 2d 247, 533 N.W.2d 759 (1995).

55. *Allstate v. Metro Sewerage Comm.*, 80 Wis. 2d 10, 358 N.W.2d 148 (1977).

56. *Milwaukee Metropolitan Sewerage District v. City of Milwaukee*, 2005 WI 8, 277 Wis. 2d 635, 652, 691 N.W.2d 658 (MMSD).

57. *Timm v. Portage County Drain Dist.*, 145 Wis. 2d 743, 751, 429 N.W.2d 512 (Ct. App. 1988).

58. See, e.g., *Scott v. Savers Property and Casualty Insurance Co.*, 2003 WI 60, 262 Wis. 2d 127, 663 N.W.2d 715 (school guidance counselor giving scholarship eligibility information to a student); *Kimps v. Hill*, 200 Wis. 2d 1, 546 N.W.2d 151 (1996) (university professor teaching and supervising a physical education class); *C.L. v. Olson*, 143 Wis. 2d 701, 422 N.W.2d 614 (1988) (parole agent granting a parolee permission to drive).

59. *Estate of Lyons v. CNA Ins. Cos.*, 207 Wis. 2d 446, 558 N.W. 2d 658 (Ct.App.1996).

60. *Showers Appraisals, LLC v. Musson Bros.*, 2013 WI 79, ¶ 2, 350 Wis. 2d 509, 835 N.W.2d 226.

61. *Lyons*, 207 Wis. 2d at 457-58, 558 N.W.2d 658.

62. *Showers*, 2013 WI 79, ¶ 30.

Courts have recognized four exceptions to immunity.⁶³

First, “discretionary” duties can be contrasted with what are termed “ministerial” duties, one of the primary exceptions to immunity. An employee or official can be liable for negligently performing a purely ministerial duty. Ministerial duties are those duties that are “absolute certain and imperative involving only the performance of a specific task.”⁶⁴ Administrative code provisions, such as those providing engineering specifications for laying underground pipe, may create ministerial duties.⁶⁵ The terms of a contract may create ministerial duties between the parties, for which there is no immunity.⁶⁶ However, not every writing creates ministerial duties; the choice of discretionary versus mandatory language is a significant factor in determining the existence of a ministerial duty.⁶⁷ For instance, in *Noffke v. Bakke*,⁶⁸ the court assessed language in “spirit rules” governing responsibilities for cheerleading coaches to determine whether those rules imposed a ministerial duty. The court concluded that the rules did not impose such a duty, based in part on language describing the rules as “guidelines,” “a useful reminder of basic procedures,” and other permissive language such as “should” (rather than a mandatory “must” or “shall”) throughout. Of note, however, the Supreme Court in two cases emphasized abating a continuing nuisance created a ministerial duty, the violation of which subjects a municipality to liability. In *Bostco LLC v. Milwaukee Metro. Sewerage Dist.*,⁶⁹ the Wisconsin Supreme Court reiterated its holding from an earlier case, *Milwaukee Metro. Sewerage Dist. v. City of Milwaukee*,⁷⁰ that a municipality has a ministerial duty to abate a known continuing nuisance, even though there may be different methods of abatement from which to choose.⁷¹ Oral communications, “rules of thumb,” and guidelines are generally not considered to rise to the level of a ministerial duty;⁷² however, the Wisconsin Supreme Court has stated that oral policies may be capable of creating a ministerial duty.⁷³

Second, a public official or employee is not immune from liability if the official or employee engages in conduct which is malicious, willful or intentional. An act or failure to warn is malicious if it results from hatred, ill will, or a desire for revenge or is inflicted under circumstances where insult or injury is intended.⁷⁴

Third, the known danger exception operates in situations where (1) an obviously hazardous situation exists and (2) “the nature of the danger is compelling and known to the officer and is of such force that the public officer has no discretion not to act.”⁷⁵ The seminal Wisconsin case applying the known danger exception is *Cords v. Anderson*.⁷⁶ *Cords* involved an accident where hikers, legally accessing a park hiking trail during nighttime, fell into a deep gorge from a hazardous portion of the trail. In that case, the court concluded that the park manager, who had known that the trail was particularly dangerous after dusk, had a ministerial duty to place warning signs or advise superiors of the trail condition.⁷⁷ Courts have also recognized that it is wise to encourage government actors to rectify dangerous situations of which they have become aware.⁷⁸

63. *Scott v. Savers Prop. and Cas. Ins. Co.*, 2003 WI 60, 262 Wis. 2d 127, 663 N.W.2d 715.

64. *Pries v. McMillon*, 2010 WI 63, 326 Wis. 2d 37, 784 N.W.2d 648.

65. *DeFever v. City of Waukesha*, 2007 WI App 266, 306 Wis. 2d 766, 743 N.W.2d 848.

66. *Major v. Milwaukee Co.*, 196 Wis. 2d 939, 539 N.W.2d 472 (Ct. App. 1995).

67. *Pries v. McMillon*, 2010 WI 63.

68. *Noffke v. Bakke*, 2009 WI 10, 315 Wis. 2d 350, 760 N.W.2d 156.

69. *Bostco LLC v. Milwaukee Metro. Sewerage Dist.*, 2013 WI 78, 350 Wis. 2d 554, 835 N.W.2d 160.

70. *Milwaukee Metro. Sewerage Dist. v. City of Milwaukee*, 2005 WI 8, 277 Wis. 2d 635, 691 N.W.2d 658.

71. *Bostco*, 350 Wis. 2d 554, ¶¶ 3, 41, 835 N.W.2d 160.

72. *Pinter v. Vill. of Stetsonville*, 2019 WI 74, 387 Wis. 2d 475, 929 N.W.2d 547.

73. *Id.*, ¶ 44.

74. *Ervin v. City of Kenosha*, 159 Wis. 2d 464, 483, 464 N.W.2d 654 (1991).

75. *C.L. v. Olson*, 143 Wis. 2d 701, 422 N.W.2d 614 (1988).

76. *Cords v. Anderson*, 80 Wis. 2d 525, 259 N.W.2d 672 (1977).

77. See also *Engelhardt v. City of New Berlin*, 2019 WI 2, 385 Wis. 2d 86, 921 N.W.2d 714 (City's Parks and Recreation Department ran a summer youth camp and took children to an aquatic center. The plaintiffs' daughter drowned. The Court found her drowning was a known danger because the camp coordinator knew the child could not swim, but told no other staff member and did not test the child's swimming ability); *Voss v. Elkhorn Area Sch. Dist.*, 2006 WI App 234, 297 Wis. 2d 389, 724 N.W.2d 420 (holding that a ministerial duty to end a class exercise arose for purposes of the known danger exception where students wearing sight-altering goggles began stumbling and falling in a room full of hard obstacles); *Turner v. City of Milwaukee*, 193 Wis. 2d 412, 535 N.W.2d 15 (Ct. App. 1995) (repeated attacks by a dog created ministerial duty for removal or destruction by municipal officials).

78. See, e.g., *Oden v. City of Milwaukee*, 2015 WI App 29, ¶ 19, 361 Wis. 2d 708, 722, 863 N.W.2d 619 (gas leak in residential area was a known and compelling danger which imposed a ministerial duty on the City to act); *Linville v. City of Janesville*, 174 Wis. 2d 571, 587-88, 497 N.W.2d 465 (Ct. App. 1993) (A paramedic had a ministerial duty to attempt a rescue from a submerged van, which he knew contained a child and an adult, rather than wait twenty minutes for the van to be pulled from the pond.).

Fourth, actions involving professional discretion may lead to liability. The professional discretion exception to governmental immunity originated in *Scarpaci v. Milwaukee County*,⁷⁹ in which the court held a county medical examiner liable for negligence committed in the course of performing an autopsy. This exception has been successfully asserted on occasions involving only the medical context.⁸⁰ Courts have not extended the exception beyond this context.⁸¹

Periodically, there have been calls by members of the Supreme Court to undertake a thorough review of the current approach to the law of immunity and to possibly alter the way in which immunity cases are decided in the future, as there were in the 2019 *Pinter* and *Engelhardt* cases discussed above. In each instance, the court has continued to uphold the doctrine of discretionary immunity, although as discussed above some of its decisions have found exceptions to immunity and, thus, a basis for liability.⁸²

Lastly, there has been a significant legislative change which affords additional immunity protections. Previously, statutory immunity did not extend to damages caused by highway defects, or from a negligent failure to maintain and prepare the roadway.⁸³ However, it has been repealed by 2011 Wis. Act 132. As a result, § 893.83 now contains provisions relating to snow and ice accumulations only, as follows: “No action may be maintained against a city, village, town, or county to recover damages for injuries sustained by reason of an accumulation of snow or ice upon any bridge or highway, unless the accumulation existed for 3 weeks. Any action to recover damages for injuries sustained by reason of an accumulation of snow or ice that has existed for 3 weeks or more upon any bridge or highway is subject to § 893.80.”

5. Immunity Under Federal Law

As under state law, certain immunities from liability are available to municipal officers when defending against federal civil rights lawsuits. Under federal law, a full or “absolute” immunity from suit is accorded to various government officials and employees including: prosecutors, except for conduct in administrative or investigatory capacity;⁸⁴ judges;⁸⁵ legislators for legislative votes;⁸⁶ court clerks;⁸⁷ guardians ad litem;⁸⁸ social workers for court related acts and recommendations;⁸⁹ and members of municipal boards or commissions when making quasi-judicial decisions, such as a Board of Review reviewing property assessments or a commissioner revoking a liquor license.⁹⁰

A “qualified” or conditional immunity is accorded to other municipal employees in certain circumstances. The doctrine of qualified immunity insulates public officials from liability if “their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.”⁹¹ This qualified immunity extends to all government officials and employees.⁹² Qualified immunity applies unless the conduct is clearly contrary to existing precedent.⁹³ The issue of qualified immunity is a question of law for the court to decide.⁹⁴

79. *Scarpaci v. Milwaukee County*, 96 Wis. 2d 663, 292 N.W.2d 816 (1980).

80. *Protic v. Castle Co.*, 132 Wis. 2d 364, 369-70, 392 N.W.2d 119 (Ct. App. 1986) (post-surgical care medical discretion); *Gordon v. Milwaukee County*, 125 Wis. 2d 62, 67-69, 370 N.W.2d 803 (Ct. App. 1985) (psychiatric diagnosis and treatment medical discretion).

81. *Scott v. Savers Prop. and Cas. Ins. Co.*, 2003 WI 60, 262 Wis. 2d 127, 663 N.W.2d 715 (“the professional discretion exception to Wis. Stat. § 893.80(4) does not apply to a guidance counselor.”).

82. See, e.g., *Bostco LLC v. Milwaukee Metro. Sewerage Dist.*, 2013 WI 78, 350 Wis. 2d 554, 835 N.W.2d 160 (Gableman, J., concurring; Abrahamson, C.J., and Bradley, J., dissenting); and *Pries v. McMillon*, 2010 WI 63, 326 Wis. 2d 37, 784 N.W.2d 648 (Abrahamson, C.J., concurring; Bradley, Roggensack and Gableman, JJ., dissenting).

83. Wis. Stat. § 893.83.

84. *Hartman v. Moore*, 547 U.S. 250 (2006); *Buckley v. Fitzsimmons*, 509 U.S. 259 (1993).

85. *Pulliam v. Allen*, 466 U.S. 522 (1984).

86. *Bogin v. Scott-Harris*, 140 L. Ed. 2d 75 (1998).

87. *Ford v. Kenosha Co.*, 160 Wis. 2d 485, 466 N.W.2d 646 (1991).

88. *Paige K.B. v. Molepeske*, 219 Wis. 2d 418, 580 N.W.2d 289 (1998).

89. *Millsbaugh v. Co. Dept. of Welfare*, 937 F.2d 1172 (7th Cir. 1991).

90. *Hyde v. Pittenger*, 633 F.3d 512 (7th Cir. 2011).

91. *Pearson v. Callahan*, 555 U.S. 223 (2009).

92. *Hunter v. Bryant*, 502 U.S. 224 (1991).

93. *Id.*

94. *Id.*

This page intentionally left blank.

Appendix

The forms in this Appendix are samples. They should be reviewed with legal counsel before use to make sure they are appropriate.

A. Hiring – Sample Documents

1. Job description (police chief)
2. Application for employment (law enforcement)
3. Authorization for Release of Information
4. Advertisement
5. Conditional offer of employment

B. Discipline – Sample Documents

1. Meeting notice
2. Written charges
3. Decisions

C. Relevant Statutes

- § 60.55
- § 60.56
- § 60.57
- § 61.65
- § 61.66
- § 62.13

This page intentionally left blank.

POLICE CHIEF JOB DESCRIPTION

The [] Police Department ("the Department") provides law enforcement services to the City of [] ("City"). The Police Chief is appointed by the City of [] Police & Fire Commission ("Commission") pursuant to §62.13(3), Stats.

The position of Police Chief is intended to provide leadership and management for the day-to-day operations of law enforcement within the City. The Chief will insure that all statutes and local ordinances are enforced. The Chief shall ensure that the City is provided with prompt emergency and pre-planned police services through planning, organization and clear direction for the entire operation of the Department. All programs and activities of the police department shall be under the direction, management and leadership of the Police Chief.

Reports to: **Direct Reports:** **Deputy Chief and Lieutenants**

FLSA Status: **Exempt**

Compensation: **\$[] Base Salary, plus City benefits**

ESSENTIAL FUNCTIONS

The duties of the Police Chief include, but are not limited to the following:

- Assures that the Department provides timely service to detect and/or respond to criminal activity, traffic accidents and control, animal control, crowd control and accident investigation;
- Assures enforcement of statutes and local ordinances.
- Assures that the Department provides timely assistance, as required, to the municipalities' Fire Department and the Emergency Medical Services to facilitate their safe and adequate response to emergency situations within the municipal boundaries.
- Plans, directs, and exercises general supervision over the work of the entire Department to meet the Department's mission and goals, including the investigation of crimes.
- Oversees the Department's personnel administration in conjunction with the Commission, including recruitment, selection, evaluation, scheduling, training and discipline, and the institution of an appropriate chain-of command.
- Develops and maintains all Department administrative and operating records, including personnel and training files and law enforcement records.
- Assists in the development with the Commission of Department rules, regulations, policies, procedures, collective bargaining proposals and strategies and general work methods and oversees their implementation and enforcement.
- Serves as the legal custodian for all Department records.
- Processes citizen inquiries and complaints.

- Prepares the annual Department budget for approval by the Commission and the City and administers its implementation.
- Prepares grant applications to obtain state and federal funding for Department programs and oversees the implementation of grants received by the Department.
- Attends Commission and City Council meetings on a regular basis and such other meetings as is necessary for the operation of the Department, including labor negotiations.
- Oversees the purchase, inventory and maintenance of Department facilities, vehicles, equipment, and other physical assets.
- Fosters communication with and outreach to municipal departments and civic, school and other groups within the municipality in furtherance of the Department's mission.
- Cooperates and assists in appropriate circumstances with other local, state and federal law enforcement agencies in the furtherance of law enforcement objectives.
- Assists in the development with the Commission of Department long- and short-range goals.
- Keeps abreast of developments in the field of police science and police administration and disseminates that knowledge as appropriate to subordinates.
- Provides back-up to subordinates and advises and assists subordinates in non-routine Department matters.
- Performs all other duties necessary to accomplish the Department's mission and goals or as assigned by the Commission.

QUALIFICATIONS

The minimum qualifications for this position are:

- Bachelor's Degree from an accredited four-year college or university in the area of Criminal Justice, Police Administration or closely-related field. Advanced study or degrees leading to a Master's degree preferred.
- Ten years of progressively responsible experience in the capacity of a sworn officer in a law enforcement agency which demonstrates leadership and command qualities.
- Five years of supervisory and administrative experience in upper management positions in a law enforcement agency of similar or larger size or complexity.
- Certified or certifiable as a police officer by the State of Wisconsin Training and Standards Board. If the latter, Certification must occur within six (6) months of acceptance of the offer of employment.
- Valid motor vehicle operator's license. A Wisconsin motor vehicle operator's license must be obtained within six (6) months of acceptance of the offer of employment.
- Residency within fifteen miles of the Department station. Residence must be obtained within six (6) months of acceptance of the offer of employment.

This position requires the skills and abilities required of Department supervisor personnel and police officers. In addition, the position requires the following skills:

- Comprehensive knowledge of police management and law enforcement theories, principles, laws, practices, rules, policies and techniques, and demonstrated ability to implement that knowledge in the performance of daily activities.
- Comprehensive knowledge of principles of public administration, budgeting, purchasing and contracting and demonstrated ability to implement that knowledge in the performance of daily activities.
- Comprehensive knowledge of principles of personnel management and leadership as applied to police personnel and demonstrated ability to implement that knowledge in the performance of daily activities.
- Ability to effectively communicate to constituent groups and the public, including the ability to use appropriate and current technology in the performance of job duties.
- Demonstrated personal and professional honesty, integrity and good judgment

PHYSICAL DEMANDS/WORK ENVIRONMENT

The following physical demands are representative and characteristic of those an employee must successfully perform while performing the essential functions of this job:

- Walking and sitting for extended periods of time.
- Ability to communicate verbally and in writing.
- Ability to see (20/20 corrected), including close, distance and peripheral vision, to discern depth, shape, texture and color, and to adjust focus and sustain prolonged visual concentration.
- Ability to coordinate eyes, hands and feet in movement.
- Ability to run, jump, crawl, climb, kneel, balance, bend, reach, stoop, carry, and push/pull heavy objects more than 50 pounds.
- Ability to drag, carry or restrain individuals, including the ability to lift or move more than 100 pounds.
- A level of physical conditioning and agility necessary to perform pursuit and other Department activities when necessary.
- Ability to use and wear Department safety apparel and devices and equipment.

The following work environments are representative and characteristic of those an employee encounters while performing the essential functions of this job:

- Indoor work, including desk and administrative functions.
- Outside work, including occasional extreme temperatures and conditions.
- Heights
- Confined spaces
- Automobiles

- Intermittent noise above 85 decibels
- Exposure to odors, toxins, diseases and pathogens.
- Night and weekend work.
- Contact with armed or dangerous persons and life-threatening situations.

This job description does not constitute an employment agreement between the employer and the employee and is subject to change by the employer as the needs of the Department require.



Wisconsin Department of Justice
Law Enforcement Standards Board
DJ-LE-330, Rev. 5/17
www.wilenet.org

APPLICATION FOR EMPLOYMENT
LAW ENFORCEMENT, JAIL OR SECURE JUVENILE DETENTION OFFICER

NOTICE: All questions must be answered. Incomplete or illegible applications will not be considered. If the space provided is insufficient for complete answers or you wish to furnish additional information, please attach additional pages.

1. PERSONAL INFORMATION			
Name (Last, First, Middle)			Social Security # (xxx-xx-xxxx)
Address (Apartment, Street, P.O. Box)			Home Telephone Number
City	State	Zip Code	Work Telephone Number
Email Address			Cell Phone Number

Have you successfully completed the basic training required for certification (i.e. 720-hour law enforcement academy)? Yes ☐ No ☐

If yes, what type(s) of basic training have you successfully completed? Law Enforcement ☐ Jail ☐ Secure Juvenile Detention ☐

If applicable, include the name of the school where you completed basic training and the date that training was completed:

Are you at least 18 years old? Yes ☐ No ☐

Are you a United States citizen? Yes ☐ No ☐

Do you have a high school diploma, GED or HSED? Yes ☐ No ☐

Do you have an Associate Degree or 60 associate degree level credits or higher from an accredited college or university? Yes ☐ No ☐

If No, were you employed as a law enforcement officer prior to February 1, 1993? Yes ☐ No ☐

The college credit requirement as written in Wisconsin Administrative Code § LES 2.01(1)(e), pertains to law enforcement and tribal law enforcement officers first employed on or after February 1, 1993.

Have you ever been convicted of a felony? Yes ☐ No ☐

Have you ever been convicted of a misdemeanor crime of domestic violence? Yes ☐ No ☐

Are you prohibited by state or federal law from possessing a firearm? Yes ☐ No ☐

Do you possess a valid Wisconsin driver's license or a valid driver's license from another state? Yes ☐ No ☐

2. EDUCATION			
Name of School(s)	Dates		Degree, Diploma, or Credits Earned
	From (mm/yyyy)	To (mm/yyyy)	
High School(s)			
College(s)			

3. EMPLOYMENT

Begin with current or most recent employer. List chronologically all employment, including summer and part-time employment while attending school. To furnish additional employment information, attach sheets of the same size and format as this application.

Name and Address of Employer	Dates of Employment	
	From (mm/yyyy)	To (mm/yyyy)
Name of Employer:		
Address:	Full-Time ☐ Part-Time ☐	Annual Salary/Wages:
City:	State:	Zip Code:
Supervisor's Name / Telephone Number:	May we contact the employer / supervisor? Yes ☐ No ☐	
Position and kind of work:	Reason for Leaving:	

Name and Address of Employer	Dates of Employment	
	From (mm/yyyy)	To (mm/yyyy)
Name of Employer:		
Address:	Full-Time ☐ Part-Time ☐	Annual Salary/Wages:
City:	State:	Zip Code:
Supervisor's Name / Telephone Number:	May we contact the employer / supervisor? Yes ☐ No ☐	
Position and kind of work:	Reason for Leaving:	

Name and Address of Employer	Dates of Employment	
	From (mm/yyyy)	To (mm/yyyy)
Name of Employer:		
Address:	Full-Time ☐ Part-Time ☐	Annual Salary/Wages:
City:	State:	Zip Code:
Supervisor's Name / Telephone Number:	May we contact the employer / supervisor? Yes ☐ No ☐	
Position and kind of work:	Reason for Leaving:	

4. MILITARY SERVICE

Branch of Service	From (mm/yyyy)	To (mm/yyyy)	Active Duty or Reserve	Highest Grade	Skill Specialty or Primary Duty

Honorably Discharged from Military Service? Yes ☐ No ☐ Not Applicable ☐

5. REFERENCES

Give three references (not relatives, or present employer; avoid listing members of the clergy).

Name:

Position/Title/Profession:

Number of Years Acquainted:

Address:

City/State/Zip:

Telephone Number:

Name:

Position/Title/Profession:

Number of Years Acquainted:

Address:

City/State/Zip:

Telephone Number:

Name:

Position/Title/Profession:

Number of Years Acquainted:

Address:

City/State/Zip:

Telephone Number:

6. GENERAL

COMPLETE IF INSTRUCTED TO DO SO BY EMPLOYING AGENCY.

Attach no more than one additional page for each answer.

- A. Why have you chosen to apply for this position?
- B. Discuss things you have done which have contributed to your life experience. Be sure to include information regarding volunteer work with civic, school, or professional organizations. Be specific about names and dates.
- C. Why do you believe you could relate to and/or work with people of different races, genders, cultures, ages, socio-economic groups, and educational levels?

APPLICANT PLEASE READ CAREFULLY AND SIGN BELOW

Information provided and statements made as part of this application may be grounds for not employing you or for dismissing you after you begin work. All information and statements made are subject to verification.

CERTIFICATION

ALL INFORMATION PROVIDED AND STATEMENTS MADE BY ME AS PART OF THIS APPLICATION, OR AS PART OF ANY ADDITIONAL INFORMATION PROVIDED IN SUPPORT OF THIS APPLICATION, ARE COMPLETE, CORRECT, AND TRUE TO THE BEST OF MY KNOWLEDGE.

I UNDERSTAND THAT IF I AM EMPLOYED, FALSE INFORMATION PROVIDED OR FALSE STATEMENTS MADE AS PART OF THIS APPLICATION MAY BE CONSIDERED AS CAUSE FOR DISMISSAL.

Applicants Signature

Date Signed

Under the provisions of § 19.36, Wis. Stats., I request that my identity as an applicant for this position not be revealed without my consent or until required under law.

Applicants Signature

Date Signed

Type <Ctrl – Enter> to add additional pages.



Wisconsin Department of Justice
Law Enforcement Standards Board
DJ-LE-305, Rev. 8/00

AUTHORIZATION FOR RELEASE OF INFORMATION

(For official use only, not to be released to unauthorized persons)

I hereby empower an employee of the _____
Employing Agency
or other authorized representative thereof bearing this release to obtain information and records, within one year of the date of this release, pertaining to me from any or all of the following sources:

1. Municipal, State, or Federal law enforcement agencies
2. Selective Service System
3. Any banking institution
4. Any place of business (for purposes of obtaining credit or employment data)
5. Credit rating bureaus or institutions
6. Any previous employer
7. Present employer
8. Any school, college, university, or other educational institution
9. Any law enforcement or jail officer

Exceptions to this blanket authorization

1. Any medical information in the possession of any source named above until subsequent to a conditional offer of employment (per Americans With Disabilities Act).
2. _____
3. _____

This release is executed to authorize _____
Employing Agency
as a prospective employer, to obtain the above information. It is understood that said information shall be used only in consideration of my employment and shall not be further disseminated for any purpose.

Date

Signature - Full Name

Address - Street and Number

City

State

Zip

Witness: _____
Signature

This page intentionally left blank.

Police Chief

The City is seeking applications for Police Chief. The City is a city of [] residents located in [] County Wisconsin. The Police Department consists of [] sworn officers, including K-9 and School Liaison officers, and [] Records Clerks

Minimum requirements include a Bachelor's Degree from an accredited four-year college or university in the area of Criminal Justice, Police Administration or closely-related field, ten years of progressively responsible experience in the capacity of a sworn officer in a law enforcement agency including five years of supervisory and administrative experience in upper management positions in a law enforcement agency of similar or larger size or complexity, certified or certifiable as a police officer by the State of Wisconsin Training and Standards Board, a valid driver's license and residency within fifteen miles of the Department station.

The compensation package for the Police Chief includes an annual base salary of \$[], which will be reviewed after one year of employment, plus the benefits package available to exempt City employees and the use of a City squad car.

Applications must be returned on or before [], to []. Applications can be filed either in writing or electronically by email to []The current Police Chief Job Description and application materials may be obtained from the City's website at []

The City is an equal opportunity employer.

This page intentionally left blank.

Personal and Confidential

[to]

RE: Conditional Offer of Employment

Dear [name]:

I have been authorized by the Commission to extend to you a conditional offer of employment as the [] Chief. This offer is being extended to you on the condition that you satisfactorily complete the final stages of the hiring process which consist of:

1. Background Investigation;
2. Psychological Evaluation; and
3. Negotiation of the terms and conditions of employment.

The psychological evaluation will take place on [] at []

The background investigation is currently underway.

Upon satisfactory results of the conditions outlined above, the Commission will confirm in writing your appointment as Police Chief. Until then, please keep your status confidential.

As we move forward, we will discuss the best way to announce your appointment. Please call me if you have any questions. Congratulations.

This page intentionally left blank.

City of [] Police and Fire Commission

Agenda

[date, time and location]

- 1. Call to Order**
- 2. Roll Call**
- 3. Proof of Notice of Meeting**
- 4. Holding of a hearing pursuant to Wis. Stat. §62.13(5) related to disciplinary charges filed against [].**
- 5. Consideration of adjourning to closed session pursuant to Wis. Stat. §19.85(1)(a) for purposes of deliberating with respect to the evidence received during the hearing and pursuant to Wis. Stat. § 19.85(1)(b) for purposes of taking formal action with respect to the charges, provided that the Commission's final vote may take place in open session if requested by [].**

The Commission's deliberation may be recessed to another date and time as determined by the Commission.
- 6. Return to open session if requested by [] for a final vote on the charges.**
- 6. Adjourn**

This page intentionally left blank.

**BOARD OF POLICE COMMISSIONERS
OF THE CITY OF []**

COMPLAINT

Filed against a commissioned officer of the City of []
Police Department by [] pursuant
to § 62.13(5), Wis. Stats.,

[name],

Complainant,

v.

[name]

Respondent.

STATEMENT OF CHARGES

I, [], Wisconsin do hereby state the following charges as a Complaint against [name], of
the City of [] Police Department:

I. DEPARTMENTAL RULES ALLEGED TO HAVE BEEN VIOLATED

The following rules, contained in the indicated sections of the Manual of Policy,
Regulations and Procedures of the [] Police Department (Rules), were applicable to and
governed the conduct of [name] (name) at all times stated herein and relevant hereto, and read
in relevant part as follows:

II. CHARGES

A. [Cite Policy]

Count 1: Statement of violation.

FACTS:

B.

Count 2:

FACTS:

C.

Count 36

FACTS:

IV. MAYOR'S RECOMMENDATIONS

Upon proof of the conduct of [name] as it relates to the violation of the rules and regulations of the [] Police Department charge above, I recommend that the Board of Police Commissioners of the City of [] find that there is just cause to sustain the charges and to impose as a penalty termination of [name] employment and discharge as Police Chief Officer of the City of [] and such other penalty as the Board deems the good of the service may require.

Dated:

STATE OF WISCONSIN)

) SS.

COUNTY OF DANE)

[name], Mayor of the City of [], being first duly sworn, deposes and says that he has read the foregoing Statement of Charges and knows the contents thereof, that he believes them to be true of his own knowledge except as to those matters stated therein to be upon information and belief, and as to those matters he believes them to be true, and that the grounds for your affiant's information and belief are the oral and written reports, statements and investigation conducted by or on behalf of the City of [] or others relating to such charges in possession of your Affiant.

Mayor
City of []

Subscribed and sworn to before me
this ____ day of _____, 2019

Notary Public, State of Wisconsin
My commission expires: _____.

Board of Police and Fire Commissioners

Charge

This charge is filed pursuant to Wis. Stats. § 62.13 (5)(b) permitting charges to be filed against a police officer or fire fighter. Charges may be filed by the chief of a department, by the Board of Police and Fire Commissioners or any of its members, or by an aggrieved person.

A person making a complaint against a police officer is hereby advised in accordance with Wis. Stat. §§ 66.0511(3) and 946.66 that “Whoever knowingly makes a false complaint regarding the conduct of a law enforcement officer is subject to a Class A forfeiture.”

INFORMATION ABOUT PERSON FILING COMPLAINT

Name: _____

Address: _____

Telephone number: _____

INFORMATION ABOUT PERSON NAMED IN THE COMPLAINT

Name: _____

Rank (if known) Name: _____

Employing Department: ☐ Police ☐ Fire

STATEMENT OF CHARGES:

Describe the action, on the part of the person named in this complaint, you believe violated a department rule, city ordinance or standards of acceptable conduct. Use additional sheets if you need more space, initial each and attach them to this form.

STATEMENT OF CHARGES (CONTINUED)

SOURCES OF INFORMATION If the actions described in the Statement of Charges are based, in whole or in part, on information obtained from other sources, please provide the name and address of each source, or otherwise identify the source of your information, such as a document that has information supporting the complaint.

SPECIFICATION OF VIOLATION

Cite the department rule, city ordinance, or standards of acceptable conduct you believe the person named in this complaint violated.

PREFERENCES CONCERNING CONFIDENTIALITY

- ☐ I request that my name be kept confidential.
- ☐ I request that my address and telephone number be kept confidential.
- ☐ I request that sources of information provided as part of this complaint be kept confidential.
- ☐ I do not request confidentiality in this matter.

Complainant's Signature: _____ Date Signed: _____

VERIFICATION UNDER OATH

State of Wisconsin)
_____ County)

I, _____, the above named Complainant, being duly sworn, on oath depose and state that I have read the foregoing complaint, and that I know it is true and complete to my own knowledge, except as to those matters based upon information and belief, and as to those matters I believe the same to be true.

Complainant's Signature: _____

Subscribed and sworn to before me this _____ day of _____, _____

Notary Public, _____ County, Wisconsin

My Commission is (permanent) or (expires on _____).

This page intentionally left blank.

BEFORE THE BOARD OF POLICE AND FIRE COMMISSIONERS
OF THE CITY OF FAIRVIEW**

Diane Wesley,
Complainant

vs.

Police Officers Ray Jarvis, Osian
Reilly, Mya Chase, and Dean
Solis,
Respondents

CONSOLIDATED
DECISIONS AND ORDERS

CONSOLIDATED DECISIONS

Case Summary

Complainant Diane Wesley filed charges against Police Officers Mya Chase, Dean Solis, Osian Reilly, and Ray Jarvis. The statement of charges before us consists of a packet of materials filed with us by Diane Wesley, headed by our standard-form COMPLAINT document, naming the four individual officers as respondents. We refer to this packet as the “complaints.” The officers accepted service of the complaints through their attorney on October 20, 2015. We omit a description of several procedural difficulties preceding the trial of this matter at our evidentiary hearing on January 7, 2016. Complainant has acted for herself; Respondents have been represented by Attorney Karl Ramirez, Legal Director of the Wisconsin Professional Police Association.

After Complainant Wesley had presented her case, counsel for the respondents moved to dismiss the complaints on the grounds that no violation of any standard of conduct had been demonstrated by the evidence. We deferred ruling on that motion until the respondents had presented their defense. Counsel in his closing statement renewed the motion to dismiss.

After receiving the testimony and exhibits offered by the parties at hearing, we recessed for deliberations and now issue our decisions and orders in this consolidated document.

Legal Standard

Our disciplinary decisions are subject to Wis. Stat. § 62.13, which sets forth the standards which the Board must use in imposing discipline, summarized generally as “just cause” and known colloquially as the “seven standards:”

1. Whether the subordinate could reasonably be expected to have had knowledge of the probable consequences of the alleged conduct.
2. Whether the rule of order that the subordinate allegedly violated is reasonable.
3. Whether the chief, before filing the charge against the subordinate, made a reasonable effort to discover whether the subordinate did in fact violate a rule or order.
4. Whether the effort described under subd. 3 was fair and objective.
5. Whether the chief discovered substantial evidence that the subordinate violated the rule or order as described in the charges filed against the subordinate.
6. Whether the chief is applying the rule or order fairly and without discrimination against the subordinate.

7. Whether the proposed discipline reasonably relates to the seriousness of the alleged violation and to the subordinate's record of service with the chief's department.

These standards are clearly designed to guide decisions on charges prosecuted by chiefs, but the statute does not distinguish formally between such charges and those brought by a citizen such as Ms. Wesley; we are merely to consider the seven standards "to the extent applicable," and therefore we must evaluate the applicability of the seven standards to the facts before us in each instance.

The Incident and the Charges: Findings of Fact

We sketch a broad outline of the events underlying these complaints, omitting many details from the complaint materials, extensive testimony, and exhibits. On September 1, 2015, at approximately 7:50 a.m., Respondents Police Officers Jarvis, Reilly, and Chase were dispatched to the Fairview Foods store on South Willow Road in response to a telephone report by Respondent P.O. Solis, who was not on duty, that he had seen at a distance, through a store window, a person matching the description of Eileen Moore, who was wanted for very serious criminal violations. Moore had apparently injured an officer by dragging him with her moving auto, so concern for officer safety had been part of the department briefing regarding Moore. P.O. Jarvis received the dispatch call while on the road and was first to arrive on the scene; P.O.s Reilly and Chase responded in separate vehicles from the First District office, arriving shortly behind Tieu. In fact, P.O. Solis was mistaken; he had seen Diane Wesley, not Eileen Moore. P.O. Jarvis arrived in the lot, spotted Diane Wesley and her vehicle, concluded correctly that she was the subject of the dispatch, stopped his squad in front of the Wesley vehicle, and approached Diane Wesley, who was standing at the open door of her car intently counting money which lay on the driver's seat. Diane Wesley did not respond to P.O. Jarvis' oral instructions to step back from her car. P.O. Jarvis approached closely and placed his hands on Diane Wesley's right arm, continuing his instructions and intending to direct her away from the vehicle. Diane Wesley was startled, upset, noncompliant, vocally resistive; she denied that she was Moore and referred to her identification on the car seat. P.O. Jarvis tightened his grasp into a compliance hold, eliciting further vocal resistance; apparently Diane Wesley did step back perhaps one or two steps from the car doorway. This entire interaction between P.O. Jarvis and the Complainant did not take very long, perhaps less than a minute.

Roughly at this point P.O.s Reilly and Chase arrived, and P.O. Jarvis released his hold and received Diane Wesley's identification – testimony is not clear as to how. The officers now realized that Diane Wesley most probably was not Eileen Moore. P.O. Jarvis offered an explanation and apology which were not well received by Diane Wesley, and withdrew to his squad to run a computer check on the driver's license; P.O.s Reilly and Chase maintained the contact with Diane Wesley, offering further explanation and apology, without substantially satisfying Diane Wesley. When P.O. Jarvis confirmed Diane Wesley's identity and returned her license with further apology, Wesley remained unassuaged. P.O.s Jarvis and Reilly then left the scene; P.O. Chase remained at Diane Wesley's request in order to assist Wesley with unrelated business.

Photographs of both Eileen Moore and Diane Wesley from the records of the Fair Lake County Sheriff's Office are included in the complaints and were introduced separately into evidence by Respondents. P.O. Solis had seen the Moore photographs at the beginning of the shift from which he had gone off duty when he called in his mistaken sighting at Fairview Foods. P.O. Jarvis had not seen a photograph of Eileen Moore, did not have a photograph with him in his squad, did not attempt to obtain a photograph by using his MDT while responding to the dispatch, and testified that doing so would not have been practical. Testimony of the officers also indicated that

department policy and practice does not anticipate or require that officers always have or obtain photographs of subjects before contact. Chase and Reilly neither had nor obtained photos of Eileen Moore. The evidence shows that using the MDT system to obtain photographs of subjects while responding on calls is often not practical, although the MDT system apparently can generate photo printouts.

Diane Wesley reported being in physical and emotional distress during and after the incident. She was and is deeply offended to have been mistaken for Eileen Moore. She testified that the compliance hold applied by P.O. Jarvis was painful, and we infer that she may believe that she was injured, but she did not present evidence corroborating any physical injury.

At our hearing Diane Wesley was adamant and emotional regarding her version of events, which she perceives to differ from the narratives of the officers. However, we regard the differences among the accounts as well within the normal range of variations among perception and recollection of participants and witnesses to any event, especially stressful events. In effect we accept Diane Wesley's version of the events for our purposes, to the extent that her version may differ from others presented. Our disposition of these charges is not based on any finding of disputed fact but on the facts presented by Diane Wesley. The evidence of the respondents was helpful, credible, thorough, and gave us a much fuller understanding of the incident but does not fundamentally alter our analysis or conclusions.

Discussion; Conclusions of Law

The complaints do not specify violations of department rules, City of Fairview ordinances, or state statutes. However, the complaints refer to excessive use of force, false accusations, and racial discrimination. Respondents did not object to the complaints on the grounds of insufficient specificity of these allegations, and we believe that the complaints in context are sufficiently specific to frame the issues of possible violations. Respondents certainly know and knew that they must not use excessive force, falsely accuse subjects of law violations, or engage in racial discrimination, on risk of discipline. These concepts are well known, understood, and accepted, and pass the reasonableness test. In short, the complaints are sufficient under the first two of the "Seven Standards," to the extent that those standards are applicable.

Standards 3 through 6 direct us to review the investigation conducted by a chief prior to bringing charges before us and therefore are largely inapplicable to complaints brought by a person other than a chief. The standards are suggestive of the due process which we would expect to respect in our decision-making, calling for fairness, objectivity, and non-discrimination. In summary, in accordance with these elements of the Seven Standards to the extent applicable here and in accordance with other legal requirements, including the overall requirement of "just cause," in order to impose discipline we must find by a preponderance of the evidence that a respondent did in fact violate a rule or order.

We have concluded that the evidence before us has not established that any respondent violated any rule or order. Our conclusion does not reflect a difficult weighing of evidence and a close call of non-preponderance; we find simply no evidence whatsoever that a rule was violated by an officer.

We do not reach this conclusion by rejecting the evidence offered by Diane Wesley and accepting the evidence offered by the respondents. We believe Diane Wesley in every material respect. Her testimony was articulate, intelligent, passionate, and entirely credible, and her dissatisfaction is entirely understandable and sympathetic. But the conduct of the officers in this matter reflects

nothing more than very reasonable mistakes of fact, and perhaps only one of those – P.O. Solis thought he had sighted Eileen Moore when he hadn't; he had instead seen Diane Wesley. From that point forward, each officer performed dutifully, responsibly, reasonably, and courteously, although not to the satisfaction of the Complainant.

Diane Wesley alleges racial discrimination, suggesting that she was wrongfully contacted because “they think all black look a lot alike.” [sic] We take this allegation and concern very seriously, although we are not sure that the issue raised is actually one of illegal discrimination strictly defined. We find no evidence to support any intentional misconduct related to or arising from Diane Wesley's race. P.O.s Jarvis, Reilly, and Chase were responding to a dispatch regarding a specific individual who is, in fact, black, and who was in fact wanted by police for unlawful and dangerous behavior – that person being Eileen Moore. These officers correctly spotted and contacted the individual who had been the subject of the dispatch, namely Diane Wesley. The identification mistake, and logically the only possible point of “discrimination” in the sense of confusing one black person for another, was by the off-duty officer who saw Diane Wesley at a distance and thought that she might be Eileen Moore, whose photograph he had seen hours previously. We have examined the photographs of Eileen Moore and Diane Wesley. They are rather standard institutional identification photos, front and profile – “mug shots.” We simply do not agree that any person, black or white, could be faulted for thinking that the one person seen at a distance might be the other. Of course, the one *is not* the other; Diane Wesley *is not* Eileen Moore; but the confusion under the circumstances is not unreasonable. Two people, regardless of race, can look sufficiently alike to be confused under some circumstances, especially at a distance or where time is short, as happened here; such confusion is not evidence of racial discrimination.

Outside the formal parameters of our narrow disciplinary jurisdiction, commissioners personally noted three areas of concern or question. First, we may regret that the powerful MDT technology cannot be routinely used to provide immediately useful information to responding officers, particularly relevant photographs. Of course, just a few years ago such resources were not conceived of, and probably in a few more years technology will have taken us much further – quicker downloads, for example; or unified software systems; or voice activation. Without attributing fault either to department policy or to individuals, we can hope for continuing efforts to maximize the field utility of all department technologies, for the benefit both of police officers who may be dealing with dangerous individuals in some cases, and of the public, to avoid identification errors.

Of course, in this instance we cannot conclude and do not suggest that P.O. Jarvis would have been aided by a photograph of Eileen Moore, because he did not have a clear view of the subject until after he had initiated contact; she did not see him coming, and he approached her from behind while she was bending into her car.

Second, the very reasonable confusion of the identities of Eileen Moore and Diane Wesley, the discrepancies in detail of narrative testimony among complainant and the respondents, and the emotional commitment of complainant especially to her version of the incident, all illustrate neatly the limitations and weaknesses of eyewitness identification methods and witness recall.

Third, we note the view that P.O. Jarvis, far from using excessive force under the circumstances as he understood them, employed the barest minimum tactical control. Eileen Moore was properly understood to be a dangerous person likely to flee; in fact, Jarvis had blocked her vehicle for that reason. P.O. Jarvis exercised a very careful and respectful judgment in approaching what he in good faith thought might be a dangerous person. Of course, he subsequently learned that

the subject was not Moore, and was not dangerous. We respect his initiative, his judgment, and his professional skill, and we do not second-guess his call in the circumstances.

We note that all of the officers who were on duty and involved in this incident expressed to Diane Wesley their sincere regret for the identification error that took place at the scene.

In summary, Diane Wesley did not establish that any order or rule violation occurred. Formally, this failure of proof may be construed as insufficiency of Complainant's case under standards 3 through 6.

We are limited by statute to a simple set of possible penalties: suspension, reduction in rank, and discharge. We cannot impose other sanctions, and we do not have other remedial powers. We cannot issue command orders or policy guidance either to these respondents or more generally to department management. In the absence of sustained allegations of misconduct, we need not address possible penalties broadly or in the framework of the seventh of the seven standards, which deals with setting an appropriate penalty.

CONSOLIDATED ORDERS

Respondents' motions to dismiss are granted. The Complaints of Diane Wesley served October 20, 2015, are dismissed, with prejudice.

*Approved following deliberations, and
Filed with the Secretary this 19th day of January 2016:*

FAIRVIEW BOARD OF POLICE AND FIRE COMMISSIONERS

Comm. _____, President

Comm. _____, Secretary

Comm. _____

Comm. _____

Comm. _____

**** All names, dates and locations in this sample decision have been changed.**

This page intentionally left blank.

**BEFORE THE CITY of []
POLICE AND FIRE COMMISSION**

In the Matter of the Disciplinary Charges
Filed Against City of []
Officer []

**WRITTEN DECISION OF THE CITY OF []
POLICE AND FIRE COMMISSION**

I. Procedural History

On August 5, [], City of [] Police Chief [] (“Chief”) imposed an unpaid suspension on City [] Officer [] (“Officer []”). Pursuant to §62.13(5)(c), Stats., Officer [] requested a hearing with respect to that disciplinary suspension. Exhibit A10. On August 12, [], Chief [] filed formal charges against Officer [] and a copy of the charges was served upon Officer [] on August 23, []. Exhibit A1.

The parties stipulated that prior to the commencement of the evidentiary hearing in this matter all procedural requirements of §62.13(5) had been met. Transcript, pp. 7, 9 and Exhibits A2-A6. The City of [] Police and Fire Commission (“the Commission”) convened on November 9, [] to hold the evidentiary portion of the hearing. Exhibit A7. The Commission recessed until December 13, [] at which time both parties completed their cases and the evidentiary portion of the hearing was concluded. Tr., p. 362.

The parties filed briefs with the Commission, the last of which was received on March 17, []. The Commission reconvened on March 29, [] to deliberate. At the conclusion of those

deliberations, the Commission voted unanimously, pursuant to a properly seconded motion, to sustain a portion of the charges against Officer [] and to order as discipline for Officer [] an unpaid suspension. The Commission did not sustain two of the charges filed against Officer [].

II. Facts Relevant to the Charges.

The factual basis behind the charges is essentially undisputed. The following are facts which the Commission finds at the base of the issue:

III. Commission Analysis of the Seven Standards in §62.13(5).

Section 62.13(5) provides that no officer may be suspended unless the Commission determines that “just cause” exists.” Just cause” is defined by statute in terms of seven standards which must be met before discipline can be imposed. §62.13(5)(em)(1)-(7), Stats. The statute also requires the Commission to put its findings and determinations in writing with respect to each of the standards and file that document with the Commission secretary within three days. What follows below is the Commission’s position with respect to each of the standards. For better continuity of discussion, the analysis starts with Standard 5.

5. Whether the chief discovered substantial evidence that the subordinate violated the rule or order as described in the charges filed against the subordinate.

The Commission finds that Officer [] violated the following department policies:

The basis for the Commission’s conclusion that Officer [] violated these policies is:

The Commission believes this conduct and the lapse of judgment it reflects strikes to the

core of Policy []. Such conduct is so outside the bounds of expected conduct of an officer of this Department that it clearly reflects poorly on the Department and brings it into disrepute in violation of Policy [].

The Commission also believes such conduct violated Policy [].

The Chief also charged Officer [] with violating the following policy:

The testimony reflects that there was a difference of opinion in the Department whether they in fact were “evidence.” Thus, the Commission does not sustain the charges with respect to this alleged policy violation.

The decision in this regard ties in with the first of the seven factors, namely, whether Officer [] could have been expected to know his conduct was a Policy violation. To the extent that there is a significant dispute in the Department as to whether they were evidence, the Commission does not believe the Chief sustained his burden on this allegation.

The Chief also alleged a violation of Policy [] which states as follows:

For the same reasons the Commission believes the Chief did not sustain his burden with respect to Policy [], the Commission also believes the Chief did not sustain his burden with respect to Policy [].

1. Whether the subordinate could reasonably be expected to have had knowledge of the probable consequences of the alleged conduct.

Having concluded that Officer [] violated Policies [], the Commission reviewed the remaining six standards with respect to those two policies.

The Commission believes that Officer [] could reasonably be expected to have had knowledge of the probable consequences of his conduct. In his charges, the Chief alleged that Officer [] violated Policy []. The Commission believes that rather than establishing a substantive basis for assessing conduct, Policy [] is best viewed in this matter as providing evidence with respect to whether Officer [] was in a position to know of the expectations of the Department policies.

Chief [] testified that all Department officers are provided a copy of the policies and procedures and are reviewed at minimum on an annual basis. Transcript, pp., 182, 183. Officer [] did not testify or submit any evidence disputing or putting into issue the fact that he was not aware of the Policies []. In fact, Officer [] has been disciplined before with respect to his lack of judgment and the performance of personal tasks while on duty.

Policies [] do not itemize all types of conduct which might constitute their violation. That would be impossible to do. By their nature, the policies address a code of conduct addressing at a fundamental level an officer's exercise of judgment. The Commission believes that Officer [] conduct was so lacking in proper judgment that he reasonably should have known that such conduct would subject him to discipline. The Commission rejects Officer [] argument that since there is no Department policy that he cannot be disciplined. The Commission believes it is a matter of common sense and the exercise of proper judgment even if there is not a policy strictly prohibiting such actions.

Officer [] argues that he did not know the precise level of discipline that he would be subjected to if he violated these policies and, thus, a finding on this factor cannot be sustained. The Commission rejects this argument. The Commission does not believe this standard requires

an officer to know precisely what level of discipline he will receive for any given type of conduct. This would be impossible to accomplish given the fact that each act of misconduct must be gauged in the circumstances within it occurred. The Commission also does not believe that this is legally required by the statute.

2. Whether the rule or order that the subordinate allegedly violated is reasonable.

This parties stipulated that Policies [] are reasonable.

3. Whether the chief, before filing the charge against the subordinate, made a reasonable effort to discover whether the subordinate did in fact violate a rule or order.

The Commission believes Chief [] made more than a reasonable effort to investigate Officer [] conduct at issue and assess whether that conduct constituted a violation of Department policy.

The Chief authorized a Professional Standards Investigation. The chronology of that investigation is as follows:

This investigation took over twenty hours to complete. The Commission believes Officer [] received due process in this investigation.

4. Whether the effort described under subd. 3. was fair and objective.

The Commission believes the investigation was fair and objective. Chief [] assigned the investigation to Lieutenant []. Officer [] was given two opportunities to address Lieutenant [], both with union representation present. Chief [] then met separately with Officer [], again with union representation present.

The Commission finds no evidence to suggest that the investigation was anything but fair and objective. Officer [] argues that there was too much investigation, i.e., the Professional Standards Investigation was not called for under these circumstances and, thus, is evidence that the investigation was not fair and objective. The Commission rejects this argument. The Commission believes that given the nature of the allegations, the investigation was appropriate and fair.

6. Whether the chief is applying the rule or order fairly and without discrimination against the subordinate.

Chief [] testified that in his review of the investigation report from Lieutenant [], he also considered disciplinary actions taken against other officers in order to assess Officer [] situation. There was no testimony presented or documents entered into evidence which would support a conclusion that Chief [] applied Policies with respect to Office [] in a manner other than he does with other officers in the Department. There was no evidence that Chief [] decision to file charges was the result of discrimination, either in the sense of disparate treatment between officers in the Department or in the context of state or federal discrimination laws.

7. Whether the proposed discipline reasonably relates to the seriousness of the alleged violation and to the subordinate's record of service with the chief's department.

The Commission believes that the conduct which gives rise to its finding that Officer [] violated Policies [] is very serious and merits the consideration of severe discipline, including termination. The Commission notes that Chief [] also considered termination in assessing Officer [] conduct, but took into consideration the following factors:

- Disciplinary history

Positive markers

The Commission notes that Officer [] conduct did not involve just a momentary lapse of judgment. While the Commission believes that even though more severe discipline may be warranted, after considering the positive markers regarding Officer [] work performance and the fact that he has not been subject to discipline since [], the Commission believes an unpaid suspension is appropriate punishment for Officer [] violating Policies [].

IV. Commission Order.

By an appropriate motion made at the conclusion of its deliberations on March 29, [], the Commission sustained Chief [] charges with respect to Policies [] on the basis set forth above and Ordered that Officer [] serve an unpaid suspension as discipline for that conduct. This Decision will constitute the written Order to that effect.

The Commission authorized Commission member [] to sign this order on behalf of all Commissioners.

Dated this _____ day of April, [].

City of [] Police and Fire Commission
By

[], Member

This page intentionally left blank.

CHAPTER 60 – TOWNS

60.55 FIRE PROTECTION.

(1) General authority.

(a) The town board shall provide for fire protection for the town. Fire protection for the town, or any portion of the town, may be provided in any manner, including:

1. Establishing a town fire department.
2. Joining with another town, village or city to establish a joint fire department. If the town board establishes a joint fire department with a village under s. 61.65 (2) (a) 3., the town board shall create a joint board of fire commissioners with the village under s. 61.65 (2) (b) 2.
3. Contracting with any person.
4. Utilizing a fire company organized under ch. 213.
5. Creating a combined protective services department under s. 60.553.

(b) The town board may provide for the equipping, staffing, housing and maintenance of fire protection services.

(2) Funding. The town board may:

- (a) Appropriate money to pay for fire protection in the town.
- (b) Charge property owners a fee for the cost of fire protection provided to their property under sub. (1) (a) according to a written schedule established by the town board.
- (c) Levy taxes on the entire town to pay for fire protection.
- (d) Levy taxes on property served by a particular source of fire protection, to support the source of protection.

60.56 LAW ENFORCEMENT.

(1) General authority.

(a) The town board may provide for law enforcement in the town or any portion of the town in any manner, including:

1. Establishing a town police department.
2. Joining with another town, village or city to create a joint police department. If the town board establishes a joint police department with a village under s. 61.65 (1) (a) 3., the town board shall create a joint board of police commissioners with the village under s. 61.65 (1) (b) 1. b.
3. Contracting with any person.
4. Creating a combined protective services department under s. 60.553.

(am) If a town board establishes a town police department under par. (a) 1. or 2. and does not create a board of police commissioners singly or in combination with another town, village or city, or if a town board establishes a combined protective services department under s. 60.553 and does not create a board of police and fire commissioners, the town may not suspend, reduce, suspend and reduce, or remove any police chief, chief of a combined protective services department, or other law enforcement officer who is not probationary, and for whom there is no valid and enforceable contract of employment or collective bargaining agreement which provides for a fair review prior to that suspension, reduction, suspension and reduction or removal, unless the town board does one of the following:

1. Establishes a committee of not less than 3 members, none of whom may be an elected or appointed official of the town or be employed by the town. The committee shall act under s. 62.13 (5) in place of a board of police and fire commissioners. The town board may provide for some payment to each member for the member's cost of serving on the committee at a rate established by the town board.

2. Appoint a person who is not an elected or appointed official of the town and who is not employed by the town. The person shall act under s. 62.13 (5) in place of a board of police and fire commissioners. The town board may provide for some payment to that person for serving under this subdivision at a rate established by the town board.

(b) The town board may provide for the equipping, staffing, housing and maintenance of law enforcement services.

(2) Funding. The town board may appropriate money to fund law enforcement services.

60.57 POLICE AND FIRE COMMISSION.

(1) The town board may:

(a) If the town has a police department, establish a board of police commissioners.

(b) If the town has a fire department, establish a board of fire commissioners.

(c) If the town has both a police and fire department, or a combined protective services department, establish a board of police and fire commissioners.

(2) A board created under this section shall be organized in the same manner as boards of police and fire commissioners under s. 62.13 (1).

(3) A board created under this section is subject to the provisions of s. 62.13 (2) to (5) and (7) to (12) to the extent that the provisions apply to 2nd and 3rd class cities. In applying s. 62.13 under this section, the town board chairperson has the powers and duties specified for a mayor, the town board has the powers and duties specified for a common council and the town has the powers and duties specified for a city.

CHAPTER 61 – VILLAGES

61.65 POLICE AND FIRE DEPARTMENTS; PENSION FUNDS.

(1)

(a) Except as provided under s. 61.66, each village with a population of 5,000 or more shall, and each village with a population of under 5,000 may, provide police protection services by one of the following methods:

1. Creating its own police department.

2. Contracting for police protective services with a city or town, with another village, or with a county. A village that contracts for police protective services shall pay the full cost of services provided. A village may not contract with a county to provide all of the village's police protective services under this subdivision.

3. Creating a joint police department with a city or town or with another village.

4. Abolishing its police department and entering into a contract with a county under s. 59.03 (2) (e) for the county sheriff to provide law enforcement services in all parts of the village. If the village is located in more than one county, it may not abolish its police department under this subdivision unless the village enters into a contract under this subdivision with the county in which the greatest amount of the village's equalized value, population, or territory is located. If a village wishes to abolish its police department under this subdivision, it shall act under s. 62.13 (2s), and s. 62.13 (2s), as it applies to cities, applies to villages.

(am) If a village establishes a police department and does not create a board of police commissioners singly or in combination with another municipality, or if a village board establishes a combined protective services department under s. 61.66 and does not create a board of police and fire commissioners, the village may not suspend, reduce, suspend and reduce, or remove any police chief, chief of a combined protective services department, or other law enforcement officer who is not probationary, and for whom there is no valid and enforceable contract of employment or collective bargaining agreement which provides for a fair review prior

to that suspension, reduction, suspension and reduction or removal, unless the village does one of the following:

1. Establishes a committee of not less than 3 members, none of whom may be an elected or appointed official of the village or be employed by the village. The committee shall act under s. 62.13 (5) in place of a board of police and fire commissioners. The village board may provide for some payment to each member for the member's cost of serving on the committee at a rate established by the village board.
2. Appoint a person who is not an elected or appointed official of the village and who is not employed by the village. The person shall act under s. 62.13 (5) in place of a board of police and fire commissioners. The village board may provide for some payment to that person for serving under this subdivision at a rate established by the village board.

(b)

1.
 - a. Each village with a population of 5,000 or more but less than 5,500 that creates its own police department may create or designate a committee of the board of trustees to perform any duty conferred by the board relating to police protective services, or may create a board of police commissioners to govern the department.
 - b. Each village with a population of 5,000 or more that creates a joint police department with another municipality shall create a joint board of police commissioners with that municipality to govern the joint department.
2. Each village with a population of 5,500 or more that creates its own police department shall create a board of police commissioners to govern the department.

(2)

(a) Except as provided under s. 61.66, each village with a population of 5,500 or more shall provide fire protection services by one of the following methods:

1. Creating its own fire department.
2. Contracting for fire protection services with a city or town or with another village. A village that contracts for fire protection services shall pay the full cost of services provided.
3. Creating a joint fire department with a city or town or with another village.
4. Utilizing a fire company organized under ch. 213, except that this subdivision does not apply in a village that provides fire protection services under subd. 1. on December 9, 1993.

(b)

1. Each village with a population of 5,500 or more that creates its own fire department shall create a board of fire commissioners to govern the department.
2. Each village with a population of 5,500 or more that creates a joint fire department with another municipality shall create a joint board of fire commissioners with that municipality to govern the joint department.

(3g)

(a) Any village with its own board of police commissioners and its own board of fire commissioners may consolidate the boards into one board of police and fire commissioners.

(b) Municipalities with a joint protective services department shall create a joint board of commissioners to govern that department. If a village operates both of its protective services departments jointly with one municipality, the village and the other municipality may create a joint board of police and fire commissioners to govern each department. The municipalities may jointly determine the apportionment between the municipalities of costs relating to the joint department or departments and the joint board.

(c) Any village that has created one separate protective services department and one joint protective services department may authorize the joint board governing the joint department also

to govern the separate protective services department, subject to the approval of the joint board. A village that receives the approval of the joint board is not required to create or maintain a separate board of commissioners to govern the separate protective services department.

(d)

1.

a. A board created under this section shall be organized in the same manner as boards of police and fire commissioners under s. 62.13 (1).

b. Municipalities creating a joint board under this section may jointly determine the number of commissioners to be appointed to the joint board by each municipality and the length of the commissioner's term. A majority of the commissioners is a quorum. The provisions of s. 62.13 pertaining to the appointment of commissioners and records of proceedings apply to the joint board.

2. Any board or joint board created under this section is subject to the provisions of s. 62.13 (2) to (12) pertaining to a board of police and fire commissioners or to appointments, promotions, suspensions, removals, dismissals, reemployment, compensation, rest days, exemptions, organization and supervision of departments, contracts and audits, to the extent that the provisions apply to 2nd or 3rd class cities. Optional powers of a joint board, listed in s. 62.13 (6), apply only if the electors in each municipality approve these powers by referendum. In applying s. 62.13, the village president has the powers and duties specified for a city mayor; the village clerk has the powers and duties specified for a comptroller; the village board has the powers and duties specified for a common council; and the village has the powers and duties specified for a city. In applying s. 62.13 to a town that creates a joint board or joint department with a village, the town chairperson has the powers and duties specified for a city mayor; the town clerk has the powers and duties specified for a comptroller; the town board of supervisors has the powers and duties specified for a common council; and the town has the powers and duties specified for a city.

3. Appointments to a board or joint board are not subject to confirmation by a village board of trustees unless required by ordinance.

(3r) Each village with a population of 5,500 or more is subject to s. 40.19 (4).

(4) Persons who are members of the police departments in villages of 5,000 or more, and members of fire departments in villages of 5,500 or more, according to the last federal census, shall automatically and without examination, become members of the police and fire departments of such villages under this section.

(5) The provisions of this section shall be construed as an enactment of statewide concern for the purpose of providing a uniform regulation of police and fire departments.

(8) Any village having a volunteer fire department shall be reimbursed by the department of transportation not to exceed \$500 for any fire call on a state trunk highway or any highway that is a part of the national system of interstate highways maintained by the department of transportation if the village submits written proof that the village has made a reasonable effort to collect the cost from the insurer of the person to whom the fire call was provided or from the person to whom the fire call was provided, except that the village may attempt to collect the cost from the person only if the village is unsuccessful in its efforts to collect from the person's insurer or if the person has no insurer. If the village collects the cost from an insurer or such person after the department reimburses the village, the village shall return the amount collected to the department.

61.66 COMBINED PROTECTIVE SERVICES.

- (1) Notwithstanding s. 61.65 (1) (a), (2) (a) and (3g) (d) 2., any village may provide police and fire protection services by any of the following:
 - (a) A combined protective services department which is neither a police department under s. 61.65 (1) (a) nor a fire department under s. 61.65 (2) (a) and in which the same person may be required to perform police protection and fire protection duties without being required to perform police protection duties for more than 8 hours in each 24 hours except in emergency situations, as described under s. 62.13 (7n).
 - (b) Persons in a police department or fire department who, alone or in combination with persons designated as police officers or fire fighters, may be required to perform police protection and fire protection duties without being required to perform police protection duties for more than 8 hours in each 24 hours except in emergency situations, as described under s. 62.13 (7n).
- (2) The governing body of a village acting under sub. (1) may designate any person required to perform police protection and fire protection duties under sub. (1) as primarily a police officer or fire fighter for purposes described in ss. 62.13 (7m), (7n), (10m), and (11), 891.45, 891.453, and 891.455.

CHAPTER 62 – CITIES

62.13 POLICE AND FIRE DEPARTMENTS.

- (1) Commissioners. Except as provided in subs. (2g), (2m), (2s), and (8) (b) each city shall have a board of police and fire commissioners consisting of 5 citizens, 3 of whom shall constitute a quorum. The mayor shall annually, between the last Monday of April and the first Monday of May, appoint in writing to be filed with the secretary of the board, one member for a term of 5 years. No appointment shall be made which will result in more than 3 members of the board belonging to the same political party. The board shall keep a record of its proceedings.
- (2) Exception.
 - (a) Except as provided under sub. (6m), subs. (1) to (6) shall not apply to cities of less than 4,000 population except by ordinance adopted by a majority of all the members of the council. A repealing ordinance may be adopted by a like vote.
 - b) A city that creates a joint police or fire department with a village under s. 61.65 is not required to create a separate board of police and fire commissioners under this section. The city shall create a joint board of commissioners to govern the joint department, as required in s. 61.65. If the city also creates one separate protective services department in addition to the joint protective services department, the city shall create a separate board of commissioners to govern that department. A city's joint board of commissioners is subject to s. 61.65 (3g) (d). A city's separate board of commissioners is subject to this section.
- (2e) Combined protective services.
 - (a) A city may provide police and fire protection services by any of the following:
 1. A combined protective services department which is neither a police department as otherwise constituted under this section nor a fire department as otherwise constituted under this section, in which the same person may be required to perform police protection and fire protection duties without being required to perform police protection duties for more than 8 hours in each 24 hours except in emergency situations, as described under sub. (7n).
 2. Persons in a police department or fire department who, alone or in combination with persons designated as police officers or fire fighters, may be required to perform police protection and fire protection duties without being required to perform police protection duties for more than 8 hours in each 24 hours except in emergency situations, as described under sub. (7n).

(b) The governing body of a city acting under par. (a) may designate any person required to perform police protection and fire protection duties under par. (a) as primarily a police officer or fire fighter for purposes described in subs. (7m), (7n), (10m), and (11) and ss. 891.45, 891.453, and 891.455.

(2g) Contracting for police protective services. A city may enter into a contract for police protective services with a village, a town, another city, or a county. A city that contracts for police protective services shall pay the full cost of services provided. A city that contracts for all of its police protective services under this subsection and for all of its fire protective services under sub. (8) (b) is not required to have a board of police and fire commissioners. A city that contracts for all of its police protective services under this subsection, but not for all of its fire protective services under sub. (8) (b), shall have a board of police and fire commissioners under this section, but the board may only address issues related to the fire department. A city may not contract with a county to provide all of the city's police protective services under this subsection.

(2m) Joint departments, contract services.

(a) A city may create a joint police department or a joint fire department, or both, with another city.

(b) A city that creates a joint police department or a joint fire department, or both, with another city under par. (a) is not required to create a separate board of police and fire commissioners under this section. The cities shall create a joint board of commissioners to govern the joint department. If only one joint department is created, each city shall retain its existing board of police and fire commissioners to govern the separate department. The cities may jointly determine the number of commissioners to be appointed to the joint board by each city and the length of the commissioners' terms. A majority of the commissioners is a quorum. A joint board of commissioners that is created under this paragraph to govern a joint police department is subject to the provisions of subs. (3) to (7n), a joint board of commissioners that is created under this paragraph to govern a joint fire department is subject to the provisions of subs. (8) to (12) and a joint board of commissioners that is created under this paragraph to govern a joint police and fire department is subject to the provisions of subs. (2) to (12).

(2s) Abolition of police department, county law enforcement.

(a) Subject to pars. (b) to (d), a city may abolish its police department or combined protective services department if it enters into a contract with a county under s. 59.03 (2) (e) for the county sheriff to provide law enforcement services in all parts of the city. If the city is located in more than one county, it may not abolish its police department or combined protective services department under this paragraph unless the city enters into a contract under this paragraph with the county in which the greatest amount of the city's equalized value, population or territory is located. If a city that is located in more than one county enters into a contract with a county under this paragraph, the jurisdiction of the contracting county's sheriff and deputies includes the entire territory of the city.

(b) If a city wishes to contract with a sheriff for law enforcement services, the common council shall adopt a resolution, as described under s. 59.03 (2) (a), requesting that such services be provided. The resolution shall provide that such services are to be provided exclusively by the county.

(c) The contract described under par. (a) shall address at least all of the following elements:

1. The division, with the county, of the city's assets and liabilities that relate to the city's police department and the amount that the county will pay, if any, for such assets.
2. A description of the level of law enforcement and the number of deputies that the county will provide to the city and the amount that the city will pay for the services in excess of the city's portion of the county's law enforcement levy.
3. A procedure for the city to request, or require, that the county provide additional law enforcement services and the cost the county may charge the city for providing additional services.

4. The term of the agreement and procedures for the renewal, extension, or termination of the agreement.

(d) No contract that is entered into under this subsection may take effect until all of the following occur:

1. The county board approves under s. 59.03 (2) (a) the resolution adopted under par. (b).
2. The governing bodies of the city and the county approve the contract.
3. The expiration of any collective bargaining agreement between the city and its police department employees.
4. The city and county discuss the provision of emergency "911" telephone service within the area to which the contract applies.

(3) Chiefs. The board shall appoint the chief of police and the chief of the fire department or, if applicable, the chief of a combined protective services department, who shall hold their offices during good behavior, subject to suspension or removal by the board for cause.

(4) Subordinates.

(a) The chiefs shall appoint subordinates subject to approval by the board. Such appointments shall be made by promotion when this can be done with advantage, otherwise from an eligible list provided by examination and approval by the board and kept on file with the clerk.

(b) Any person who, on June 23, 1943 has served and acted as a full-time city police patrolman, patrolwoman or police officer performing the services by virtue of regular assignment therefor under the orders and supervision of the chief of police of said city, and receiving his or her salary on the regular official payroll of said police department for a continuous period of more than 10 years, although not regularly appointed from an eligible list, is deemed to have been regularly appointed, as of the time of the commencement of his or her service.

(c) For the choosing of such list the board shall adopt, and may repeal or modify, rules calculated to secure the best service in the departments. These rules shall provide for examination of physical and educational qualifications and experience, and may provide such competitive examinations as the board shall determine, and for the classification of positions with special examination for each class. The board shall print and distribute the rules and all changes in them, at city expense.

(d) The examination shall be free for all U.S. citizens over 18 and under 55 years of age, with proper limitations as to health and, subject to ss. 111.321, 111.322, and 111.335, arrest and conviction record. The examination, including minimum training and experience requirements, shall be job-related in compliance with appropriate validation standards and shall be subject to the approval of the board and may include tests of manual skill and physical strength. All relevant experience, whether paid or unpaid, shall satisfy experience requirements. The board shall control examinations and may designate and change examiners, who may or may not be otherwise in the official service of the city, and whose compensation shall be fixed by the board and paid by the city. Veterans and their spouses shall be given preference points in accordance with s. 63.08 (1) (fm).

(e) The council of any city of the 2nd, 3rd or 4th class may provide that members of the police force shall be of both sexes. The fire and police commission shall select each police officer from an eligible list.

(5) Disciplinary actions against subordinates.

(a) A subordinate may be suspended as hereinafter provided as a penalty. The subordinate may also be suspended by the commission pending the disposition of charges filed against the subordinate.

(b) Charges may be filed against a subordinate by the chief, by a member of the board, by the board as a body, or by any aggrieved person. Such charges shall be in writing and shall be filed with the president of the board. Pending disposition of such charges, the board or chief may suspend such subordinate.

(c) A subordinate may be suspended for just cause, as described in par. (em), by the chief or the board as a penalty. The chief shall file a report of such suspension with the commission immediately upon issuing the suspension. No hearing on such suspension shall be held unless requested by the suspended subordinate. If the subordinate suspended by the chief requests a hearing before the board, the chief shall be required to file charges with the board upon which such suspension was based.

(d) Following the filing of charges in any case, a copy thereof shall be served upon the person charged. The board shall set date for hearing not less than 10 days nor more than 30 days following service of charges. The hearing on the charges shall be public, and both the accused and the complainant may be represented by an attorney and may compel the attendance of witnesses by subpoenas which shall be issued by the president of the board on request and be served as are subpoenas under ch. 885.

(e) If the board determines that the charges are not sustained, the accused, if suspended, shall be immediately reinstated and all lost pay restored. If the board determines that the charges are sustained, the accused, by order of the board, may be suspended or reduced in rank, or suspended and reduced in rank, or removed, as the good of the service may require.

(em) No subordinate may be suspended, reduced in rank, suspended and reduced in rank, or removed by the board under par. (e), based on charges filed by the board, members of the board, an aggrieved person or the chief under par. (b), unless the board determines whether there is just cause, as described in this paragraph, to sustain the charges. In making its determination, the board shall apply the following standards, to the extent applicable:

1. Whether the subordinate could reasonably be expected to have had knowledge of the probable consequences of the alleged conduct.
2. Whether the rule or order that the subordinate allegedly violated is reasonable.
3. Whether the chief, before filing the charge against the subordinate, made a reasonable effort to discover whether the subordinate did in fact violate a rule or order.
4. Whether the effort described under subd. 3. was fair and objective.
5. Whether the chief discovered substantial evidence that the subordinate violated the rule or order as described in the charges filed against the subordinate.
6. Whether the chief is applying the rule or order fairly and without discrimination against the subordinate.
7. Whether the proposed discipline reasonably relates to the seriousness of the alleged violation and to the subordinate's record of service with the chief's department.

(f) Findings and determinations hereunder and orders of suspension, reduction, suspension and reduction, or removal, shall be in writing and, if they follow a hearing, shall be filed within 3 days thereof with the secretary of the board.

(g) Further rules for the administration of this subsection may be made by the board.

(h) No person shall be deprived of compensation while suspended pending disposition of charges.

(i) Any person suspended, reduced, suspended and reduced, or removed by the board may appeal from the order of the board to the circuit court by serving written notice of the appeal on the secretary of the board within 10 days after the order is filed. Within 5 days after receiving written notice of the appeal, the board shall certify to the clerk of the circuit court the record of the proceedings, including all documents, testimony and minutes. The action shall then be at issue and shall have precedence over any other cause of a different nature pending in the court, which shall always be open to the trial thereof. The court shall upon application of the accused or of the board fix a date of trial, which shall not be later than 15 days after such application except by agreement. The trial shall be by the court and upon the return of the board, except that the court may require further return or the taking and return of further evidence by the board. The question to be determined by the court shall be: Upon the evidence is there just cause, as described under par. (em), to sustain the charges against the accused? No costs shall be allowed either party and the clerk's fees shall be paid by the city. If the order of the board is reversed, the accused shall be

forthwith reinstated and entitled to pay as though in continuous service. If the order of the board is sustained it shall be final and conclusive.

(j) The provisions of pars. (a) to (i) shall apply to disciplinary actions against the chiefs where applicable. In addition thereto, the board may suspend a chief pending disposition of charges filed by the board or by the mayor of the city.

(5m) Dismissals and reemployment.

(a) When it becomes necessary, because of need for economy, lack of work or funds, or for other just causes, to reduce the number of subordinates, the emergency, special, temporary, part-time, or provisional subordinates, if any, shall be dismissed first, and thereafter subordinates shall be dismissed in the order of the shortest length of service in the department, provided that, in cities where a record of service rating has been established prior to January 1, 1933, for the said subordinates, the emergency, special, temporary, part-time provisional subordinates, if any, shall be dismissed first, and thereafter subordinates shall be dismissed in the order of the least efficient as shown by the said service rating.

(b) When it becomes necessary for such reasons to reduce the number of subordinates in the higher positions or offices, or to abolish any higher positions or offices in the department, the subordinate or subordinates affected thereby shall be placed in a position or office in the department less responsible according to the subordinate's efficiency and length of service in the department.

(c) The name of a subordinate dismissed for any just cause set forth in this section shall be left on an eligible reemployment list for a period of 2 years after the date of dismissal, except that if the dismissal was for disciplinary reasons the subordinate may not be left on an eligible reemployment list. If any vacancy occurs, or if the number of subordinates is increased, in the department, the vacancy or new positions shall be filled by persons on the eligible reemployment list in the inverse order of the dismissal of the persons on the list.

(6) Optional powers of board.

(a) The board of fire and police commissioners shall have the further power:

1. To organize and supervise the fire and police, or combined protective services, departments and to prescribe rules and regulations for their control and management.
2. To contract for and purchase all necessary apparatus and supplies for the use of the departments under their supervision, exclusive of the erection and control of the police station, fire station, and combined protective services station buildings.
3. To audit all bills, claims and expenses of the fire, police, and combined protective services departments before the same are paid by the city treasurer.

(b) The provisions of this subsection shall apply only if adopted by the electors. Whenever not less than 70 days prior to a regular city election a petition therefor, conforming to the requirements of s. 8.40 and signed by electors equal in number to not less than 20 percent of the total vote cast in the city for governor at the last general election, shall be filed with the clerk as provided in s. 8.37, the clerk shall give notice in the manner of notice of the regular city election of a referendum on the adoption of this subsection. Such referendum election shall be held with the regular city election, and the ballots shall conform with the provisions of ss. 5.64

(2) and 10.02, and the question shall be "Shall s. 62.13 (6) of the statutes be adopted?"

(6m) If a city of less than 4,000 population has not by ordinance applied subs. (1) to (6) to the city, the city may not suspend, reduce, suspend and reduce, or remove any police chief, combined protective services chief, or other law enforcement officer who is not probationary, and for whom there is no valid and enforceable contract of employment or collective bargaining agreement which provides for a fair review prior to that suspension, reduction, suspension and reduction or removal, unless the city does one of the following:

(a) Establishes a committee of not less than 3 members, none of whom may be an elected or appointed official of the city or be employed by the city. The committee shall act under sub. (5) in place of the board of police and fire commissioners. The city council may provide for some

payment to each member for the member's cost of serving on the committee at a rate established by the city council.

(b) Appoint a person who is not an elected or appointed official of the city and who is not employed by the city. The person shall act under sub. (5) in place of the board. The city council may provide for some payment to that person for serving under this paragraph at a rate established by the city council.

(7) Compensation. The salaries of chiefs and subordinates shall be fixed by the council. Unless the council otherwise provides, in cities of the 4th class rewards for the apprehension of criminals may be retained by the person entitled thereto. Such salaries when so fixed may be increased but not decreased by the council without a previous recommendation of the board. The council may provide that the salaries shall increase with length of service.

(7m) Rest day.

(a) The council of every city of the fourth class shall provide for, and the chief of the police or fire department, or the chief of the combined protective services department, shall assign to, each subordinate police officer, or each subordinate designated as primarily a police officer under sub. (2e) (b), in the service of such city one full rest day of 24 consecutive hours during each 192 hours, except in cases of positive necessity by some sudden and serious emergency, which, in the judgment of the chief of police, the fire chief, or the chief of the combined protective services department, demands that such day of rest not be given at such time. Arrangements shall be made so that each full rest day may be had at such time or times as will not impair the efficiency of the department.

(b) The council of every city of the second or third class shall provide for, and the chief of the police or fire department, or the chief of the combined protective services department, shall assign to, each subordinate police officer, or each subordinate designated as primarily a police officer under sub. (2e) (b), in the service of such city 2 full rest days of 24 consecutive hours each during each 192 hours, except in cases of positive necessity by some sudden and serious emergency, which, in the judgment of the chief of police, the fire chief, or the chief of the combined protective services department, demands that any such day of rest not be given at such time. Arrangements shall be made so that each full rest day may be had at such time or times as will not impair the efficiency of the department. This section shall not apply to villages to which s. 61.65 is applicable.

(7n) Hours of labor. Except when a labor agreement under subch. IV of ch. 111 that governs hours of employment exists, the council of every 2nd, 3rd or 4th class city shall provide for a working day of not more than 8 hours in each 24 except in cases of positive necessity by some sudden and serious emergency, which, in the judgment of the chief of police, the fire chief, or the chief of the combined protective services department, demands that such workday shall be extended beyond the 8-hour period at such time; and, when such emergency ceases to exist, all overtime given during such emergency shall be placed to the credit of such subordinate police officer, or each subordinate designated as primarily a police officer under sub. (2e) (b), and compensatory time under s. 103.025 given therefor.

(8) Fire department.

(a) The council may provide by ordinance for either a paid or a volunteer fire department and for the management and equipment of either insofar as not otherwise provided for by law. In the case where a combination of paid and volunteer fire department is provided for, such city shall be reimbursed by the department of transportation, not to exceed \$500 for any fire calls on a state trunk highway or on any highway that is a part of the national system of interstate highways and is maintained by the department of transportation if the city submits written proof that the city has made a reasonable effort to collect the cost from the insurer of the person to whom the fire call was provided or from the person to whom the fire call was provided, except that the city may attempt to collect the cost from the person only if the city is unsuccessful in its efforts to collect from the person's insurer or if the person has no insurer. If the city collects the cost from an

insurer or such person after the department reimburses the city, the city shall return the amount collected to the department.

(b) A city may enter into a contract for fire protective services with a village, a town, or another city. A city that contracts for fire protective services shall pay the full cost of services provided. A city that contracts for all of its fire protective services under this paragraph and for all of its police protective services under sub. (2g) is not required to have a board of police and fire commissioners. A city that contracts for all of its fire protective services under this paragraph, but not for all of its police protective services under sub. (2g), shall have a board of police and fire commissioners under this section, but the board may address only issues related to the police department.

(10m) Rules governing leaving city. Subject to approval of the common council the fire chief, police chief, or the chief of the combined protective services department, may establish rules requiring subordinate fire fighters, or each subordinate designated as primarily a fire fighter under sub. (2e) (b), to obtain permission before leaving the city.

(11) Fire fighters, rest day. The common council of every 4th class city, having a population of 5,000 or more and a fire department, or a combined protective services department, shall provide for, and the chief of the fire department, police department, or combined protective services department shall assign to each full paid subordinate member of the fire department or subordinate designated as primarily a fire fighter under sub. (2e) (b), a period of 24 consecutive hours off duty during each 72 hours, except in cases of positive necessity by some sudden and serious fire, accident or other peril, which, in the judgment of the chief engineer or other officer in charge demands that the day of rest not be given at that time. The provisions of this section shall not apply to cities having a 2-platoon or double shift system. The provisions of this subsection apply to a person designated as primarily a fire fighter who is employed by a police department, as described in sub. (2e).

(11a) Fire department platoons.

(a) The common council, or other governing body of every city of the first, second and third class, whether organized under a general or special charter, having a paid fire department, shall provide for, and the governing power of the fire department shall divide the full paid fire fighting force in the fire department into 2 or more bodies or platoons. Each platoon shall work, or be on duty, alternately an equal number of hours or as nearly so as the governing power of the fire department of each such city decides, but no member of said platoon shall be on duty for a longer continuous period of time than the governing power of the fire department designates, except in cases of positive necessity by some sudden and serious fire, accident, or other peril, which in the judgment of the chief engineer or other officer in charge demands.

(b) The hours of duty of each member of the fire fighting force of the fire department in every city of the first class shall be limited to 72 hours in any one week. If any such department shall be on a platoon system of hours of duty, 12 hours may be added to one of 2 successive weeks and such period of time deducted from the previous or succeeding week, as the case may be.

(12) Legislative intent. Section 62.13 and chapter 589, laws of 1921, chapter 423, laws of 1923, and chapter 586, laws of 1911, shall be construed as an enactment of statewide concern for the purpose of providing a uniform regulation of police, fire, and combined protective services departments.



League of Wisconsin Municipalities
131 W. Wilson Street, Suite 505
Madison, WI 53703

608-267-2380
league@lwm-info.org
lwm-info.org